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THE
ONTARIO REPORTS

CASES DETERMINED IN THE SUPREME COURT
OF ONTARIO (THE COURT OF APPEAL FOR
ONTARIO AND THE HIGH COURT OF
JUSTICE FOR ONTARIO).

CITED [1941] O.R.

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JUDGES
OF THE
SUPREME COURT OF ONTARIO
DURING THE PERIOD OF THESE REPORTS.

THE COURT OF APPEAL FOR ONTARIO.

THE HON. ROBERT SPELMAN ROBERTSON, Chief Justice of Ontario.

- “ “ WILLIAM RENWICK RIDDELL, J.A.
 - “ “ WILLIAM EDWARD MIDDLETON, J.A.
 - “ “ CORNELIUS ARTHUR MASTEN, J.A.
 - “ “ ROBERT GRANT FISHER, J.A.
 - “ “ WILLIAM THOMAS HENDERSON, J.A.
 - “ “ CHARLES PATRICK MCTAGUE, J.A.
 - “ “ JOHN GORDON GILLANDERS, J.A.
-

THE HIGH COURT OF JUSTICE FOR ONTARIO.

THE HON. HUGH EDWARD ROSE, Chief Justice of the High Court.

- “ “ JOHN ANDREW HOPE, J.
- “ “ GEORGE FRANKLIN MCFARLAND, J.
- “ “ JAMES CARDWELL MAKINS, J.
- “ “ FREDERICK DRUMMOND HOGG, J.
- “ “ JOHN KEILLER MACKAY, J.
- “ “ AINSLIE WILSON GREENE, J.
- “ “ EDGAR RUDOLPH EUGENE CHEVRIER, J.
- “ “ WILFRID DANIEL ROACH, J.
- “ “ JOHN MILTON GODFREY, J.
- “ “ GEORGE ALEXANDER URQUHART, J.
- “ “ JAMES GERALD KELLY, J.
- “ “ CHARLES PERCY PLAXTON, J.

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DETERMINED IN THE

SUPREME COURT OF ONTARIO

[COURT OF APPEAL.]

Follis v. The Township of Albemarle et al.

Evidence—Claim by assign of a deceased person—Necessity for Corroboration of defendants' assertion—The Evidence Act, R.S.O. 1937, ch. 119, sec. 11—Meaning of "assign"—Trusts—Principle that no person can take advantage of a state of things produced by his own unwarrantable act or default.

Sec. 11 of The Evidence Act, R.S.O. 1937, ch. 119, provides as follows: "In an action by or against the heirs, next-of-kin, executors, administrators or assigns of a deceased person, an opposite or interested party shall not obtain a verdict, judgment or decision on his own evidence, in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence."

Held, that sec. 11 of The Evidence Act applies to the defence of a third party against the claims of an assign of a deceased person as much as to claims by a third party against the assign or against the executors or administrators of a deceased person; and the phrase "assigns of a deceased person" includes a donee of land from a deceased person.

AN action for declarations as to the title to land.

The action was tried by McTAGUE J.A., without a jury, at Walkerton.

O. E. Klein, K.C., for the plaintiff.

W. S. Middlebro, K.C., for the defendant Belmore.

Campbell Grant, for all other defendants.

May 7th, 1940. McTAGUE J.A.:—Action by the plaintiff to set aside and have declared void a tax deed, dated 9th day of November, 1937, from the County of Bruce to the defendant, Adis, or, alternatively, for a declaration that the defendant Belmore as grantee from Adis by deed of 29th April, 1938, is trustee for the plaintiff and should be ordered to convey to her.

About the 26th day of May, 1933, one Leonard W. Ferguson negotiated with the defendant Belmore for the purchase of the land in question, then vacant, at the price of \$800.00. As a result a deed in the usual form was given by Belmore to the plaintiff at

Ferguson's request. At the time of closing two difficulties presented themselves. There were arrears of taxes, and Belmore, although a married man, was not living with his wife, and she was not available to execute the deed. According to the evidence of Mr. Snyder, in whose law office the transaction took place, Ferguson agreed to waive execution of the deed by Mrs. Belmore, and Ferguson and Belmore agreed to adjust the taxes between themselves without the aid of a lawyer. According to Belmore he paid Ferguson in cash the amount of all taxes then outstanding.

After the property had been purchased the plaintiff and Ferguson went into possession and built a modern summer cottage at a cost of some \$9,000.00. They occupied it again in the summer season of 1934. Ferguson died on the 17th November, 1934. His estate commenced an action to have it declared that Miss Follis held the property as trustee for the Ferguson estate, and I take it, for other relief as well. In 1936 the action was settled and a consent judgment issued by which Miss Follis' absolute ownership of this particular property was confirmed.

For some years prior to the purchase of the property the defendant Belmore had been a trusted employee of the Ferguson family, and after Mr. Leonard Ferguson purchased the property Belmore moved to a cabin on the next lot. His relationship with Ferguson, and, after Ferguson's death, with Miss Follis remained the same. He had keys to the house, and, generally speaking, looked after the property as caretaker in the winter and general handyman in the summer. Quite evidently, his employers reposed complete confidence in him, and although he says he had not the same attitude to Miss Follis after Ferguson's death, I am ready to find as a fact that his conduct continued to be such that she would be deceived into believing that the relationship continued the same throughout.

It appears that the taxes for the year 1932, which had been directly assessed to Belmore, were not paid. The County Treasurer took the ordinary tax sale proceedings, advertising on the 5th day of June, 1936. Shortly after this date, Belmore learned of the sale and arranged with the defendant Adis to attend and purchase on Belmore's behalf on the 6th day of October, 1936. Adis succeeded in purchasing and received the usual certificate. Never at any time did Belmore advise Miss Follis that the property was up for sale or that he had purchased through Adis. My

conclusion from the evidence is that Belmore very carefully refrained from saying anything or doing anything to enforce his rights as a tax sale purchaser, so that Miss Follis would not become aware of the dangerous position her ownership of the property had been placed in. In due course the time for redemption passed and Adis received his tax deed. Subsequently, in the spring of 1938, he deeded the property to Belmore pursuant to the original arrangement between them. After that, of course, Belmore formally asserted his ownership.

At the end of the trial I suggested to counsel that the Court could not give any relief to the plaintiff on her prayer to set aside the tax deed. While the whole proceedings were carried on by the municipal officers in a rather unbusiness-like way, I could find no irregularity that was not cured by the remedial provisions of The Assessment Act. In addition, long prior to the issue of the writ, the Ontario Legislature had passed an Act validating all tax sales made before the 1st day of January, 1937: see ch. 41, Ontario statutes of 1938. The County Treasurer had caused Miss Follis to be notified of the tax sale by registered letter to an address in Owen Sound. It was admitted that Miss Follis' mother had signed the receipt for such a letter. According to the plaintiff's evidence the letter must have been mislaid or at any rate not brought to her attention. There was no evidence upon which I can find a conspiracy among the defendants. Accordingly, I still adhere to the view I entertained at the end of the trial and dismiss the action as against the defendants other than Belmore, but without costs.

A question left to be decided is whether Belmore can be allowed to retain a property which I consider to have a value of at least \$6,000.00, for a purchase price of \$11.02, taxes for 1932, which is, *prima facie*, his own debt. It is rather shocking to one's sense of decency in the conduct of human affairs—sufficiently shocking to induce one to give the plaintiff some relief, if at all legally possible.

The first proposition that presented itself was whether Belmore could be deprived of his bargain on the ground that a fiduciary relationship existed between him and the plaintiff. I have, with regret, reached the conclusion that relief cannot be given on that ground. I have much the same feeling as that expressed by the late Chancellor Spragge in another case, somewhat similar, also tried in Walkerton. I refer to *Fleming v.*

McNab (1882), 8 O.A.R. 636, where the Chancellor said, "If courts of equity did interfere in cases of that kind, this would be a very plain and palpable case for interfering. I do not know of any case that has ever been before me in which there has been a more flagrant dereliction from what I should call fair and honest dealing". It seems to me, however, that before the Court can give relief on this principle, there must be established some inequality of footing between the parties, either arising out of a particular relationship, as parent and child, guardian and ward, solicitor and client, trustee and *cestui que trust*, principal and agent, etc., or, on the other hand, that it can be established that dominion was exercised by one person over another, no matter how the particular relationship may be categorized. The relationship here as between Belmore and Miss Follis is more or less that of menial servant to master, and if there is any inequality of footing it operates the reverse way. Further, there is no evidence that Belmore in any way exercised dominion over the plaintiff. If he had been entrusted with paying the taxes or managing the property in the broad sense, I should have no difficulty in giving the plaintiff relief. To give relief on the principle under discussion would, I think, stretch the doctrine to the breaking point and establish a precedent which might be attended with unpredictable consequences. In this connection, besides the *Fleming v. McNab* case, I make reference to *Kennedy v. DeTrafford*, [1897] A.C. 180; *Fleet v. Fleet* (1925), 28 O.W.N. 193; *Janisse v. Stewart* (1925), 28 O.W.N. 446, and *Provincial Bank of Canada v. Marsh*, [1935] O.W.N. 334, the judgment of Riddell J.A., at p. 335.

I have already mentioned that Belmore sold the property in May of 1933. The deed was to the plaintiff, although Belmore, while admitting that the deed was read over to him, says that he was under the impression that he was selling to Ferguson. While I disbelieve Belmore's impression, I do not think that makes any difference. The covenants in the deed run to the plaintiff and among them is a covenant against encumbrances, which I think includes 1932 taxes. Belmore says he paid the money to Ferguson to pay these 1932 taxes. Assuming that to be correct, the question is in what capacity was Ferguson when he received the money—the plaintiff's agent or Belmore's agent? In his examination for discovery, questions 159 to 162, Belmore puts the matter this way:

"I says to Mr. Ferguson when he paid the money to me, 'Now the taxes are due and I haven't the right to pay them in but I will give you the money, \$12.00, and you look after it'. He said, 'Surely, I will! Then I had not anything more to do with it' ".

From this, keeping in mind that no covenant ran to Ferguson, I rather conclude that Belmore was in law attempting to implement his covenant to the plaintiff by paying the amount of 1932 taxes to Ferguson and relying on Ferguson to pay them to the municipality. The mere fact that Ferguson paid the consideration for the deed does not make the covenant run in his favour, but I think it does raise a presumption against the plaintiff that Ferguson was entitled to adjust the taxes and receive the money to pay them on her behalf. For a time my anxiety to give the plaintiff relief tended to lead me to adopt the view that Ferguson was in reality Belmore's agent to pay the taxes, and not the plaintiff's, and that therefore Belmore had not in fact implemented his covenant to the plaintiff. Further consideration of my notes of the evidence has, however, converted me to the view that Mr. Ferguson is to be regarded as the plaintiff's agent for all purposes in connection with the property. She herself specifically admits that she left everything in regard to payment of taxes to him.

Accordingly, much as I should like to declare that Belmore is a trustee for the plaintiff, and order conveyance of the property to her, I think such a result is not supportable on the evidence or the law. Therefore, the action must be dismissed against Belmore, but without costs.

The plaintiff appealed from that part of the judgment of McTague J.A. whereby the action was dismissed as against the defendant Belmore.

November 12th, 1940. The appeal was heard by RIDDELL, MIDDLETON and MASTEN JJ.A.

W. F. Spence, for the plaintiff, appellant.

W. E. Telfer, for the defendant Belmore, respondent.

November 26th, 1940. The judgment of the Court was delivered by MASTEN J.A.:—This is an appeal by the plaintiff from the judgment of McTague J.A., dated the 7th day of May, 1940, dismissing the action as against all the defendants but without costs.

The appeal is solely against the defendant Belmore, and the judgment dismissing the action as against the Township of Albemarle, the defendant Adis and the defendant Nelson remains in full force. This eliminates from the present appeal the claim to set aside the tax deed in question and all claims of conspiracy, and limits the possible relief to that which the Court may have jurisdiction to direct as against the defendant Belmore, or in other words to a declaration that the title of the respondent Belmore is held by him as a trustee for the appellant and to a direction that he convey the lands in question to her.

I have read with care the evidence and the exhibits together with the very careful and able judgment of McTague J.A., and agree with his findings of fact and his conclusions of law, save in one respect.

The action is to recover lot 33 on plan 278 of the Village of Howdenvale, in the Township of Albemarle, owned in 1936 by the appellant, which lands, valued at \$6,000.00 were sold in 1936 for 1932 taxes of \$11.02 then unpaid. These taxes had been payable by the respondent, and he through an agent bought the property at the tax sale under the circumstances hereinafter detailed.

In the year 1933 the late Leonard W. Ferguson negotiated with the respondent Belmore an agreement for the purchase of the lands in question for \$800.00. In paragraph 2 of his statement of defence the defendant Belmore alleges that he, the respondent "was not aware until after such transaction had been completed that the said deed which he executed was a grant to the plaintiff and not a grant to the said Leonard W. Ferguson", and his evidence at the trial of the action bears out this statement. The purchase price for the lot in question, namely \$800.00, was paid by Ferguson to the respondent Belmore, and I think there can be no doubt that the beneficial interest in the land became Ferguson's under the agreement of purchase.

However, before conveyance, Ferguson made a gift of the lot to the appellant and directed that the conveyance from Belmore should be made direct to her, and this was done as appears by Exhibit 1, being the deed from the respondent Belmore to the appellant dated the 26th May, 1933. The conveyance was made in pursuance of the Short Forms of Conveyances Act and contains the usual covenant that the said grantee shall

C.A. **Follis v. Township of Albemarle et al.** Masten J.A. 7
have quiet possession of the said lands free from all encumbrances.

I agree with the contention of counsel for the appellant that she is an "assign" of Leonard Ferguson, and as such is entitled to rely on the provisions of sec. 11 of The Evidence Act, R.S.O. ch. 119, which reads as follows:

"In an action by or against the heirs, next of kin, executors, administrators or assigns of a deceased person, an opposite or interested party shall not obtain a verdict, judgment, or decision, on his own evidence, in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence."

The term "assign" has been interpreted widely. Blackstone's definition is "to make or set over to another, to transfer or to assign property or some interest therein."

In *Sovereign Ins. Co. v. Peters* (1885), 12 S.C.R. 33, at p. 38, assign is defined as "to make over to another the right one has in any object as in an estate, chose in action or reversion."

In *United States v. Colorado* (1912), 225 U.S.R. 219, assign is defined as "one who becomes invested with the entryman's right in the land through the voluntary act of the latter."

A donee has been held to be an "assignee": *McAleeer v. McNamara*, (Iowa) 112 N.W. Rep. 85. See also *Smith v. Baxter* (1901), 62 N.J. Eq. 209, at p. 210; *Ripley v. Seligman* (1891), 88 Mich. 177; *Schempf v. New Era Life Ass'n*, 234 N.W. Rep. 177.

The appellant as assignee of Ferguson, a deceased person, claims relief against the respondent Belmore, an interested party. Consequently Belmore's evidence that he paid the taxes of 1932 by arrangement with Ferguson as agent for the appellant being uncorroborated, fails to establish the fact of such payment.

But the question remains, how does that help the plaintiff? For the onus being on her she can recover only on the strength of her own case and not on the weakness of the defence. This necessitates further elucidation of the circumstances.

At the time of the tax sale the taxes for the year 1932 which had been assessed against the respondent and which were payable by him, remained unpaid, and in 1936 with accumulated interest and expenses they amounted to \$11.02. In 1936 the municipal authorities acting in pursuance of The Assessment Act sold the lands, receiving from the purchaser for taxes, interest and costs of the deed of conveyance the sum of \$13.81.

In the meantime subsequent to the date of the conveyance in 1933 from the respondent to the appellant valuable improvements had been made on the property by way of buildings and otherwise so that the property as it stood at the date of the tax sale is valued by the trial Judge at the sum of \$6,000.00.

The respondent Belmore on hearing that the property was advertised to be sold for taxes procured the defendant Adis to attend the tax sale and bid in the property as agent for him, the respondent Belmore. This was done, and the property was acquired by Adis at the tax sale, and at the expiry of a year from the date of the sale the property not having been redeemed by the appellant, a tax deed was made to Adis, who subsequently conveyed to the respondent Belmore.

The whole foundation of the proceedings under which the lands were sold for taxes and conveyed to the respondent Belmore was the non-payment of the taxes for 1932, for which the respondent was himself liable under the covenant contained in his deed. The non-payment of these taxes occasioned the tax sale proceedings. The respondent seeks to excuse himself for any default in fulfilling his duty to pay these taxes by alleging that at the time when the conveyance by him to the appellant was signed and the purchase price paid, he paid in cash to Ferguson as agent for the plaintiff the sum necessary to meet these taxes, stated by him at about \$12.00, and that Ferguson, as plaintiff's agent, undertook to see them paid.

The answer of the respondent as above indicated is put forward by him as relieving him from his liability to discharge lot 33 from the back taxes of 1932, which were payable by him. The onus of establishing that he made the payment in question to Ferguson as the appellant's agent rests on him.

In *Heintzman v. Young* (1923), 54 O.L.R., at p. 17, my brother Middleton states what I have always understood to be the law as follows:

"Payment has always been regarded as a defence which must be pleaded and proved by the defendant. The plaintiff makes his case upon the production of a document shewing a promise to pay at a date past at the institution of the action. In this case upon the production of the contract it appeared that the initial instalment was past-due. In the absence of proof that it was paid, the plaintiffs, without more, had established that it was overdue and unpaid" The case itself has no

application to the present controversy and I merely quote the observation as a succinct statement of the law.

As the proof depends entirely upon respondent's own uncorroborated testimony, it is, in my view, ineffective to establish that he did make the payment as alleged, or to satisfy the onus which rested upon him of proving payment in the way he indicates.

Apart from this aspect of "onus" it seems to be established by the cases that sec. 11 of The Evidence Act applies to the defence of a third party against claims of the assign of a deceased person as much as to claims by a third party against the assign or against the executors or administrators of a deceased person: *Franco v. Puccini* (1930), 37 O.W.N. 329; *Mushol v. Benjamin* (1920), 47 O.L.R. 426; *Re Farrow Estate* (1856), 22 Beavan 400.

In the result the respondent fails to establish that he satisfied the obligation under which he lay to discharge the land from the taxes of 1932. The sale proceedings taken by the municipal authorities arose from his default, and he, having secured his tax title to these lands as a result of his own default, comes within the well established principle that no man shall profit by his own wrong: *New Zealand Shipping Co. Ltd. v. Societe des Ateliers*, [1919] A.C. 1. *Re Meyrick's Settlement*, [1921] 1 Ch. 311. In its application to the circumstances of this case the principle may be stated as follows: No one can take advantage of a state of things produced by some unwarrantable act or default on his own part.

On this ground alone I am of opinion that the judgment below as against the respondent Belmore should be reversed and that a declaration should be made that the respondent holds the title to the lands in question as trustee for the appellant, and that he be ordered to convey the same to her.

To this extent and in this manner the appeal should be allowed with costs here and below.

Appeal allowed with costs.

[HOGG J.]

Rex v. Lebreque et al.

Criminal Law—Conspiracy—Jurisdiction of County Court Judges' Criminal Court—Proof of overt acts—Whether overt acts done in Ontario.

Persons who are charged with the crime of conspiracy may be tried wherever one distinct overt act of conspiracy is in fact committed. Hence in the present case, where the Crown proved that overt acts of conspiracy had taken place in the City of Toronto, it was held that the County Court Judges' Criminal Court for the County of York had jurisdiction to try the accused on the charge of conspiracy.

A MOTION by the Crown for an order of mandamus requiring His Honour Judge Parker to continue the trial commenced before him of the charges now pending against Alfonse Lebreque, J. Albert Lavalle, J. Aime Fournier, Robert Ownes *alias* Don Beaudrey, and Wilfrid Gravel and to adjudicate upon the same.

The motion was heard by HOGG J. in Weekly Court at Toronto.

J. C. McRuer, K.C., and *W. B. Common*, K.C., for the Crown.
R. H. Greer, K.C., for Alfonse Lebreque.

C. H. Howard, for J. Aime Fournier, J. Albert Lavalle and Robert Ownes.

H. L. Romberg, for Wilfrid Gravel.

December 4th, 1940. HOGG J.:—This is an application for an order by way of mandamus directed to His Honour Judge Parker, Senior Judge of the County Court of the County of York, requiring him to continue the trial commenced before him of the charges now pending against the accused Alfonse Lebreque, J. Albert Lavalle, J. Aime Fournier, Robert Ownes *alias* Don Beaudrey and Wilfrid Gravel, and to adjudicate upon the same.

On the 12th March, 1940, an indictment was preferred to a Grand Jury in the Court of General Sessions of the Peace for the County of York, charging the above-named accused of the certain crimes set out in the indictment.

The first two counts charged the accused with conspiring together with one another and with certain other persons, some of them being unknown, at the City of Toronto and in other places in the Province of Ontario and the Province of Quebec in the years mentioned in the said counts, to commit an indictable offence, namely, that of selling or purchasing gold or silver in violation of the provisions of sec. 424(1) (b) of The Criminal

Code, contrary to the provisions of sec. 573 of the Code; and the third count charges the accused with conspiring to sell or purchase gold or silver ore or partly treated gold or silver thereby offending against the peace of the Crown.

On the 15th April, 1940, the accused appeared before His Honour Judge Parker and elected to be tried by a Judge without a jury, and on the 9th September, 1940, the accused again appeared before the learned County Court Judge in the County Court Judges' Criminal Court of the County of York, and all of the accused pleaded "not guilty" to the charges of conspiracy, and the trial was then proceeded with.

On the 27th September, 1940, when the Court had assembled after adjournment, the trial Judge announced to counsel that he had grave doubts as to whether he had jurisdiction to continue the trial and determine the guilt or innocence of the accused upon the conspiracy charges, for the reason that he was not satisfied that some overt act in connection with the conspiracy had been done in Ontario. In the course of a somewhat lengthy argument and discussion, in which the Judge and counsel for the Crown and the several accused took part, and in which counsel for the Crown contended that evidence given by the Crown of the sale of certain of the gold and silver in question in Toronto by one or more of the accused—particulars of which had been given in a statement of particulars furnished by the Crown—and evidence given of other acts in Toronto done by one or more of the accused, were evidence of an overt act, or acts, done in the City of Toronto in pursuance of an unlawful agreement between the accused, to be deduced from such acts, although the sale may have been made to innocent persons or to persons not accused of being in the conspiracy, and that the sale of such gold and silver in Toronto was part of a scheme or conspiracy which the accused had entered into to deal in gold and silver unlawfully, contrary to the sections mentioned of the Criminal Code and at common law.

The learned trial Judge said that he was of opinion that if he made a ruling that he had no jurisdiction to try the charge of conspiracy, the Crown could apply for, and obtain, a mandamus directing him to continue the trial and to adjudicate with respect to the same. The Judge stated that he did not consider that he had to go further than to make a ruling as to his jurisdiction,

refused to continue the trial and decided not to make any findings of fact.

Upon the motion for mandamus, the preliminary objection was taken by Mr. Greer on behalf of the accused that no demand had been made upon the trial Judge that the trial be continued, and that such demand must be made and be refused before proceedings for a mandamus can be heard. I am, however, satisfied that the whole question was discussed at length by the Judge and counsel, and that the Judge declined to proceed with the trial and that therefore no further formal demand upon the Judge was necessary. What constitutes a refusal depends upon the facts of each particular case: *Re Williams and the Town of Brampton* (1909), 17 O.L.R. 398.

It was also argued by Mr. Greer that the determination of the trial Judge, based upon evidence submitted by the Crown, that he had no jurisdiction to continue and decide the case because in his opinion no overt act by the accused was done within his jurisdiction, is a decision which precludes mandamus being granted. This point was raised in *Re Ratcliffe v. Crescent Mill and Timber Co.* (1901), 1 O.L.R. 331, before a Divisional Court. Chancellor Boyd, at p. 333, referring to the contention that a mandamus would not lie, said: "That is clearly right if he (the Judge) goes so far as to adjudicate by entering a non-suit or dismissing the plaint. But if he holds his hand and declines to go on with the trial or to hear and determine the matter, erroneously believing he has no jurisdiction, then he may be directed to proceed by way of mandamus from the higher Court." In my opinion, this is a statement of the law which is applicable to the facts here shown, and the application for a mandamus may be heard.

The case of *McLeod v. Amiro* (1913), 27 O.L.R. 232, cited by Mr. Greer, does not seem to be in point for the issue there was not whether the County Court Judge had jurisdiction, but that, having jurisdiction, he declined to exercise it; and upon a motion for a mandamus it was held that the trial Court had decided a matter within his jurisdiction and therefore mandamus did not lie.

The words of Grose J., in the old case of *The King v. Brisac and Scott* (1803), 4 East 163, to be found in 7 Revised Reports 551, are referred to or quoted in many judgments since delivered where the law of conspiracy is discussed.

That learned Judge said, at p. 557 (7 R.R.): "Conspiracy is a matter of inference, deduced from certain criminal acts of the parties accused; done in pursuance of an apparent criminal purpose in common between them." This definition of conspiracy was quoted in the House of Lords in *Mulcahy v. The Queen* (1868), L.R. 3 H. of L. 306, at p. 317.

The gist of the offence has been said to be the agreeing together by two or more persons to do by concerted action some unlawful or illegal act, and such agreement may be inferred or deduced from any overt acts of the parties accused done in pursuance of an apparent criminal purpose. The overt act may consist of any course, act or means done or used towards the purpose of effecting the criminal intention.

Lord Mansfield in *Rex v. Parsons* (1762), 1 Wm. Blackstone 391, a trial in which the famous Cocklane ghost played a prominent part, told a jury that there was no occasion to prove the actual fact of conspiring, but that it might be collected from collateral circumstances.

In *Rex v. Simmington* (1926), 45 C.C.C. 249, in the Supreme Court of British Columbia, in a trial for conspiracy, Macdonald J. told the jury that the existence of an unlawful agreement is generally evidenced by some overt act and although there may be no evidence of any express agreement by itself, there may be evidence of various acts from which it may be concluded that such agreement was made. See Roscoe's Criminal Evidence, 15th ed., p. 530, who says:

"In practice, however, the conspiracy is seldom known except through some overt act."

The question seems to have been raised in the discussion between the trial Judge and counsel as to whether the declarations or acts of strangers or third parties are evidence in proof of the alleged conspiracy. There seems to be no question but that such evidence may be given for such purpose. Roscoe, 15th ed., at p. 533, in discussing evidence in proof of conspiracy, says:

"But it may also be done by evidence of the acts of the prisoner, and of any others with whom he is attempted to be so connected, concurring together at the same time and to the same purpose or particular object."

Archbold's Criminal Pleading, 30th ed., at p. 35, says:

“Where an offence is done through an innocent agent, the principal may be indicted in the County in which the agent acted or in that in which the principal procured him to act.”

See also Russell on Crime, 9th ed., at p. 1137, referring to Lord Campbell's remarks in *R. v. Garrett* (1853), Dearsley Crown Cases Reserved, at p. 711.

In *R. v. Connolly and McGreevy* (1894), 25 O.R. 151, a trial for conspiracy, conversations and letters between a brother of one of the accused and the accused were admitted in evidence to prove the existence of a common design.

Part XVIII of the Criminal Code deals with speedy trials of indictable offences, and by sec. 823(a) (i) of the Code, “a judge means and includes in the Province of Ontario any judge of a county or district court, junior judge or deputy judge authorized to act as chairman of the general sessions of the peace”; and by the terms of sec. 824 of the Code, the Court shall be called The County Court Judges' Criminal Court of the county or union of counties or judicial district in which the same is held.

In *In re County Courts of British Columbia* (1892), 21 S.C.R. 446, the Supreme Court of Canada held that “‘any judge of a county court’ is one having jurisdiction in the particular locality in which he may hold a ‘speedy trial’; and a county court judge is not authorized to hold a ‘speedy trial’ beyond the limits of his territorial jurisdiction without authority from the provincial legislature so to do.”

The Crown contends that evidence has been given of overt acts done in the City of Toronto which show the existence of the criminal agreement and establish the fact of the conspiracy and that such acts having been done within the jurisdiction of the Court presided over by the trial Judge he therefore has jurisdiction.

In *The King v. Brisac* (*supra*) it was said that the criminal acts of the parties accused done in pursuance of an apparent criminal purpose and common between them are hardly ever confined to one place, and that there seems to be no reason why the crime of conspiracy may not be tried wherever one distinct overt act of conspiracy is in fact committed.

In *R. v. Connolly and McGreevy* (*supra*) the trial of the accused was held at the City of Ottawa. One of the objections taken by the defence was that no overt act had been committed in Ontario and that therefore the Court in Ontario had no juris-

diction. A case was reserved for the opinion of the Chancery Division of the High Court of Justice by the trial Judge.

The head-note reads in part: "That there is no unvarying rule that the agreement to conspire must first be established before the particular acts of the individuals implicated are admissible in evidence, and that the letters written by the defendant McGreevy at Ottawa were overt acts there in furtherance of the common design, and admissible in evidence against all privy to the conspiracy for which they might be prosecuted in this Province"

The transactions and interviews between one of the defendants and a Government engineer in Ottawa, and the letters written in Ottawa by this defendant, also the report of the Engineer, were held to be evidence.

Boyd C., at pp. 169 and 190, stated that the evidence showed overt acts in Ottawa in furtherance of the common design, and referred to the proposition of law as laid down in Starkie's Criminal Pleadings that the venue may be where the agreement was entered into, or where any overt act was done in pursuance of the common design. The Chancellor further said that the offence was not committed entirely in the Province of Quebec even if the original concerted purpose was formed in the City of Quebec; when that purpose was carried forward into overt acts in the City of Ottawa and Province of Ontario, provincial jurisdiction in Ontario then attached. In *Rex v. Isbell* in the Court of Appeal (1929), 63 O.L.R. 384, it was held that if an overt act relating to an alleged conspiracy was committed within the jurisdiction of the magistrate he thereupon, without more, acquired jurisdiction to hear the matter. And see *R. v. O'Gorman* (1909), 18 O.L.R. 427.

The evidence submitted by the Crown is to the effect that in April, 1939, the accused Lebreque in the office of the firm of Handy & Harmon in the City of Toronto, dealers in gold and silver, asked John Colgan, an employee of this firm, if they would purchase gold from him which he said came from the north country, and upon this being refused, told Colgan that his firm had bought gold belonging to him (Lebreque) from Fournier and Lavalley. The above-mentioned firm had bought gold from Lavalley in 1938. In the year 1938, Fournier spoke to the same employee of Handy & Harmon in the office of that firm in Toronto with reference to gold he had sent to this firm, and asked an

opinion as to the effect upon the sale of gold by him of an investigation then proceeding before The Ontario Securities Commission. Letters to Handy & Harmon from Fournier were put in, in which he expressed the wish to obtain a furnace capable of melting silver, copper and other metals in a short time, and stating that he had no experience in such matters. Fournier desired to have this correspondence kept from the office of Handy & Harmon. There is evidence that in 1938 Lavallo stated he was in partnership with Fournier. There was evidence produced that sales of gold were made to the said firm of Handy & Harmon in Toronto in the name of the accused Fournier during the years 1938 and 1939 amounting to a very considerable sum of money, and that sales were made to the same firm under the name of the accused Lavallo in 1938. There was evidence also of sales made under the name of the accused Fournier of gold and silver to The Royal Mint. Purchase invoices and work sheets were put in evidence showing sales by Fournier and by Lavallo to Handy & Harmon and cheques of that firm in payment. Evidence was given that Lebreque and Beaudrey came from Timmins to Toronto together in order that Lebreque might be introduced to The National Refining Company whose offices are in Toronto, Beaudrey having told Lebreque that this company paid a high price for gold and Beaudrey being promised \$100.00 by Lebreque for the introduction to the said National Refining Company. There is evidence that Lebreque, Beaudrey and Gravel went to The National Refining Company's offices; that Beaudrey went into the said offices and that on Beaudrey and Gravel being apprehended by the police while waiting outside on the street, a button of gold was found on Gravel in Toronto, this button bearing marks apparently made by the punch or punches found in Lebreque's house in Timmins.

This evidence by the Crown, of declarations, conversations and of acts, said and done in Toronto by the accused, or by strangers or third persons in connection with the accused, is evidence of overt acts, produced by the Crown for the purpose of proving the existence of the conspiracy, and this evidence is sufficient, in my opinion, to give the trial Judge jurisdiction to continue the trial and to give judgment.

An order by way of mandamus is granted as requested.

Order granted.

[COURT OF APPEAL.]

Falk v. Smith et al.

Defamation—Libel—Privilege—Duty of Judge to determine whether occasion privileged—Extent of privilege—Statement by defendant repelling prior defamatory statement made by plaintiff.

In an action for damages for libel, if it is alleged by the defendant that the libel was published on a privileged occasion, it is the duty of the trial Judge and not of the jury to determine whether the publication was in fact privileged and whether the privilege had been exceeded. In the present case it was held by the trial Judge and by the Court of Appeal that a defamatory statement made by the defendant purporting to repel prior defamatory statements made by the plaintiff was privileged and that the privilege had not been exceeded.

AN action for damages for libel.

The action was tried by MCFARLAND J. with a jury at Toronto. *A. C. Heighington*, K.C., for the plaintiff.

I. F. Hellmuth, K.C., for the defendants.

November 20th, 1940. MCFARLAND J.:—The action is for libel alleged to have been contained in an article published by the defendant Canadian Moving Picture Digest Co. Ltd. and written by the defendant Ray Lewis Smith, who is the managing editor of the magazine. The plaintiff also owns and publishes a periodical, and both it and the one published by the defendant have to do with the moving picture industry. A great deal of bitterness and rivalry apparently has arisen between the parties, and the issues in this case arise from an article published by the plaintiff in her magazine containing an attack on the defendant Ray Lewis Smith in which the statement was made that the said defendant was a "stooge of Nathanson's". This article was answered by the said defendant in the Canadian Moving Picture Digest in terms which the plaintiff claims are libellous. At the end of the taking of the evidence counsel for the defendant moved for dismissal of the action, and after argument the motion was granted and the action dismissed.

The defendant's motion is based on the ground that the occasion was privileged, and also that there was a common interest. In my opinion the defendant's contention is sound.

The underlying principle is laid down in 3 C.E.D. (Ont.), at p. 596 in the following words:

"It is difficult to attempt any classification of the innumerable cases on the subject, as the Courts have held that, in determining whether a given occasion is or is not privileged, all the

circumstances under which the publication is made must be considered, and that the question must be determined on all the facts of each case."

There is no doubt on the evidence that there was provocation given by plaintiff to defendant. In the article published by plaintiff the character and credit of the defendant had been attacked and she was in effect described to be a traitor to the cause which she espoused in connection with the moving picture industry. The word "stooge" has acquired an opprobrious signification, and when the plaintiff accused her of being "away down at the bottom of the list of Nathanson's stooges" she had a perfect right to repel that accusation.

Boiled down to essentials the plaintiff said "You are a stooge of Nathanson" and the defendant said "You are a liar".

The underlying principle is laid down by Mr. Justice Riddell in *Nixon v. O'Callaghan* (1926), 60 O.L.R. 76, in the following terms: A person has a perfect right to answer an attack on his character or conduct. We live in a work-a-day world with men of red blood with natural passions and the language used in repelling an attack is not to be carefully scrutinized.

There is also the case of *Bowen-Rowland v. Argus Press* referred to in Gatley, 3rd ed., p. 295, and the judgment of Avory J. in the famous *Wright v. Gladstone* case, in which he said that a man could defend not only his own character, but might reasonably attack the character of the complainant, and that the language was not to be closely scrutinized.

In this case I can find no evidence of malice on the part of the defendant. It was simply a perfectly justifiable effort on her part to repel the attack which had been made by the plaintiff on her character and reputation. For these reasons I had no hesitation in taking the case from the jury and dismissing the action with costs.

The plaintiff appealed to the Court of Appeal from the judgment of McFarland J. dismissing the action.

December 4th, 1940. The appeal was heard by MIDDLETON, FISHER and HENDERSON JJ.A.

D. L. McCarthy, K.C., and *A. C. Heighington*, K.C., for the plaintiff, appellant, contended that any privilege was exceeded by the defendant. The defendant's magazine had a circulation of 1,200 weekly, whereas the plaintiff's paper had a circulation

of 800 bi-monthly. Moreover, the circulation of the defendant's paper was to persons who had no interest in having the statement repelled: *Adam v. Ward*, [1917] A.C. 309; *White v. Stone*, [1939] 2 K.B. 827.

The question of excess should have been left to the jury; parts of the defendant's article were irrelevant as an answer to the plaintiff's statement and when there is some evidence to justify an inference by the jury of malice the matter should have been left to the jury.

I. F. Hellmuth, K.C., for the defendants, respondents, said that the onus was on the plaintiff to prove malice and that there was no evidence of malice. There was no evidence that the defendant did not believe what she said.

All the circumstances of the case must be considered, including the rivalry between the parties, the bitter attack and therefore the absolute right to answer. The gravity of the provocation must be considered and the expressions of the defendant in reply should not be scrutinized too closely to determine if they were a trifle stronger than necessary.

Cur. adv. vult.

December 10th, 1940. The judgment of the Court was delivered by MIDDLETON J.A.:—An appeal by the plaintiff from the judgment of the Honourable Mr. Justice McFarland dismissing an action for libel, upon the ground that the occasion of the libel was privileged and that the privilege had not been exceeded.

Mrs. Falk, the plaintiff, sued Mrs. Smith, the defendant, for a libel published in the issue of the Canadian Moving Picture Digest of the 23rd December, 1939, of which the defendant was the owner and the editor, complaining that in an article published in the paper the defendant had said of the plaintiff "You are a liar".

The defence allege that in the paper known as the Independent Moving Picture Journal, the plaintiff, the owner of that journal, had in an earlier article stated that the defendant was a "stooge". The expression "stooge" is not to be found in any recognized dictionary. It is a product during the last few years of American slang. Its meaning is not fixed or defined and perhaps not actually settled, but it is agreed that it is defamatory. It has an opprobrious signification.

The two editors of these respective papers had been publishing articles for some time in which each tried to provoke the other. The plaintiff finally on the publication in question thought she had a good ground of action and resorted to this action in the High Court.

The trial Judge took the case from the jury, acting upon the practice supported by *Adams v. Ward*, [1917] A.C. 309, namely, that where it is shown that a libel is published on a privileged occasion it is for the Judge to determine whether the action is privileged and whether privilege has been exceeded. Mr. Justice McFarland held with the defendant that the article was published on a privileged occasion and that the privilege had not been exceeded and accordingly dismissed the action.

Mr. McCarthy now complains, alleging that the privilege had been exceeded because the article in which the defendant had published her rejoinder had a larger circulation than the paper in which the libel was published. I do not think that there is anything in this point. The ladies were respectively the editors of the two papers published in the interests of the movie business. The plaintiff's paper had a circulation of about 800, the defendant's 1,200. Manifestly the publication of the article could not be in the Journal owned and published by the opposite party.

The interchange of abusive articles had gone on for some years and each lady published her own side and each sought to provoke the other. The whole episode is quite devoid of significance, and, the parties having taken to their respective newspapers to redress their grievances, must be left to the consequences of their respective acts.

I think the action was rightly dismissed and the appeal should be dismissed with costs.

Appeal dismissed with costs.

[COURT OF APPEAL.]

Re Bozanich.

The Trusts and Guarantee Co. Ltd. v. A. H. Boulton Co. Ltd.

Bankruptcy—Validity of mortgage made by debtor to a trade creditor—Whether transaction was “a settlement” within the meaning of sec. 60 of The Bankruptcy Act, R.S.C. 1927, ch. 11.

A chattel mortgage made by a debtor in favour of a trade creditor is a settlement within the statutory definition of “settlement” contained in sec. 62(3) of The Bankruptcy Act, R.S.C. 1927, ch. 11, and the provisions of sec. 60 of The Bankruptcy Act are applicable for the purpose of determining the validity of such a chattel mortgage as against the trustee in bankruptcy of the estate of the debtor: *Re Trenwith*, [1934] O.R. 326, applied.

AN appeal by the defendant in the issue from an order of Urquhart J. varying a report of His Honour Judge Coughlin made after the trial of the issue.

December 9th, 1940. The appeal was heard by RIDDELL, HENDERSON and GILLANDERS JJ.A.

Paul Martin, K.C., for A. H. Boulton Co. Ltd., appellant.

L. R. Cumming, for The Trusts and Guarantee Co. Ltd., trustee of the estate of George Bozanich, debtor, respondent.

December 21st, 1940. RIDDELL J.A.:—George Bozanich carried on business in Windsor in 1936-1939. Owing the defendants a considerable sum, he, in April, 1939, gave them a chattel mortgage for \$900.00 and, sometime later, a promissory note for \$361.45. In November, 1939, he made an assignment under The Bankruptcy Act, the plaintiffs being trustee. The validity of the proceedings coming in question, and the plaintiffs disputing the validity of the securities, and beginning an action in 1940, Mr. Justice Urquhart, on April 1, 1940, made an order for the trial of an issue in the matter in question by His Honour Judge Coughlin of the County Court of the County of Essex. His Honour reported, July 11, 1940, upholding the chattel mortgage but not the note. On an appeal being taken as to the mortgage, Mr. Justice Urquhart considered that the finding as to the chattel mortgage was to be supported if the evidence proved good faith and valuable consideration,—in other words, the chattel mortgage was such a “settlement” as was not assailable by the trustee in bankruptcy. The learned Justice, however, was not satisfied with the evidence of good faith and valuable consideration, and directed a new trial at which “the matter is . . . remitted to the County Court Judge for reconsideration on the

evidence adduced and extended and such further evidence as either the parties or the Judge may desire." From this order of September 26, 1940, the defendant appeals claiming that the learned Justice erred in holding that the chattel mortgage was a settlement within the meaning of the Bankruptcy Act; the plaintiffs cross-appealed, substantially on the ground that he should have given effect to it.

The main question at issue is whether the chattel mortgage is a "settlement" within sec. 62(3) of the Act.

Mr. Justice Urquhart considered himself bound by the decision of the Court of Appeal in *Re Trenwith*, [1934] O.R. 326, in considering the section, which runs thus:

"60. (1) Any settlement of property made after the thirtieth day of June, one thousand nine hundred and twenty, shall, if the settlor becomes bankrupt or makes an authorized assignment within one year after the date of the settlement, be void against the trustee.

"(2) Any such settlement shall, if the settlor becomes bankrupt or makes an assignment as aforesaid at any subsequent time within five years after the date of the settlement be void against such trustee, unless the parties claiming under the settlement can prove that the settlor was, at the time of making the settlement able to pay all his debts without the aid of the property comprised in the settlement, and that the interest of the settlor in such property passed to the trustee of such settlement on the execution thereof.

"(3) This section shall not extend to any settlement made

"(a) before and in consideration of marriage, or

"(b) in favour of a purchaser or incumbrancer in good faith and for valuable consideration, or

"(c) on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife;"

In the well known *Trenwith* case (*supra*), Mr. Justice Masten says:

"But for the wide statutory definition of 'settlement' contained in subsec. 3 of sec. 62, I might have been inclined to give a more limited meaning to the term; but any implication that might be drawn from the phrase 'trustee of the settlement' in subsec. 2 of sec. 60 is, in my opinion, overborne and superseded by the clear and unequivocal words of the definition contained

in subsec. 3 of sec. 62 as quoted above I conclude, therefore, that the giving of the mortgage in question falls within the term 'settlement' in sec. 60, and that the sections of The Bankruptcy Act quoted above govern the transaction in question to the exclusion of any other legislative provision."

Very many cases were cited to us; these I have examined as well as those to be found in Stroud under the word "Settlement", and those in "Words and Phrases" in the American courts which, though not binding upon us, are to be considered with respect. The cases are not wholly reconcilable, but I have not found anything that would justify me in giving a judgment which did not follow the decision in the *Trenwith* case.

The defendant fails in his contention that an error was made in finding that the chattel mortgage in question was a settlement within the meaning of The Bankruptcy Act. I think also that he fails in his contention that the report of the County Court Judge should be taken as a finding that the chattel mortgage was taken in good faith and for valuable consideration. Consequently, defendant's appeal must be dismissed.

But I am unable to agree with the contention of the plaintiff that the evidence given before the County Court Judge relating to the chattel mortgage in question established that there was no good faith on the part of the defendant sufficient to bring the transaction within the saving provision of the Act, or that in any case a finding that the transaction was a settlement within the meaning of the Act was required, also an express finding on the part of the County Court Judge of good faith and valuable consideration.

The cross-appeal of the plaintiff must, therefore, also be dismissed.

I am of opinion that the order made by Mr. Justice Urquhart was a proper one and that the appeal and cross-appeal should both be dismissed.

Success being divided, there should be no costs.

GILLANDERS J.A.:—This is an appeal from the order of the Honourable Mr. Justice Urquhart, varying the report of His Honour Judge Coughlin, Senior Judge of the County of Essex, on an issue directed to him.

The debtor George Bozanich, who had operated a small retail grocery and meat business in Windsor, made an assignment in bankruptcy on November 21st, 1939, having discontinued business several months previous thereto. On April 5th, 1939, the debtor executed a chattel mortgage in favour of the defendant company. It covered most of the debtor's store fixtures, other than his cash register, and was taken to secure past due indebtedness to the defendant company, a wholesale house with which the debtor had been dealing, and it is said as a condition for extending further credit.

On the same day the defendant company also took from the debtor a so-called lien note as security for \$361.45.

The validity of the chattel mortgage and the lien note was attacked and an issue directed to be tried by the County Court Judge. On the trial of this issue the lien note was set aside for failure to comply with the Bills of Sale and Chattel Mortgages Act, and there is no appeal in respect to this.

The learned County Court Judge reported that the chattel mortgage in question was valid and effectual as against the plaintiff and that it did not constitute a "settlement" within the meaning of sec. 60 of The Bankruptcy Act. From this an appeal was taken in respect of the finding in connection with the chattel mortgage to Urquhart J., who with reluctance felt obliged to hold that the chattel mortgage in question constituted a settlement within the provisions of sec. 60 above and remitted the matter to the County Court Judge for a new trial on this basis. From this judgment the defendant appeals to this Court.

The only question argued was whether or not the chattel mortgage in question constituted a settlement within the meaning of sec. 60 of The Bankruptcy Act. The question involved was argued before this Court with much ability by both counsel concerned.

From the reasons of the learned trial Judge it appears that were it not for the case of *Re Trenwith*, [1934] O.R. 326, he would have affirmed the finding in the report.

Section 60 of The Bankruptcy Act reads as follows:

"(1) Any settlement of property made after the thirtieth day of June, one thousand nine hundred and twenty, shall, if the settlor becomes bankrupt or makes an authorized assignment within one year after the date of the settlement, be void as against the trustee.

“(2) Any such settlement shall, if the settlor becomes bankrupt or makes an assignment as aforesaid at any subsequent time within five years after the date of the settlement, be void against such trustee, unless the parties claiming under the settlement can prove that the settlor was, at the time of making the settlement, able to pay all his debts without the aid of the property comprised in the settlement, and that the interest of the settlor in such property passed to the trustee of such settlement on the execution thereof.

“(3) This section shall not extend to any settlement made

“(a) before and in consideration of marriage, or

“(b) in favour of a purchaser or incumbrancer in good faith and for valuable consideration, or

“(c) on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife.”

Section 62(3), which is of importance, is as follows:

“(3) For the purpose of this section and sections sixty and sixty-one ‘settlement’ shall include any conveyance or transfer of property.”

In the case of *Re Trenwith*, [1934] O.R. 326, the debtor had executed and registered a mortgage on 25 acres of land, his substantial asset, to his wife purporting to secure the sum of \$7,000.00, and he had also given two sons leases on this land.

On appeal to this Court one of the questions considered was whether or not the mortgage in question was a settlement within the meaning of sec. 60. At p. 333 Mr. Justice Masten in finding the mortgage in question a “settlement” says:

“But for the wide statutory definition of ‘settlement’ contained in subsec. 3 of sec. 62, I might have been inclined to give a more limited meaning to the term; but any implication that might be drawn from the phrase ‘trustee of the settlement’ in subsec. 2 of sec. 60 is, in my opinion, overborne and superseded by the clear and unequivocal words of the definition contained in subsec. 3 of sec. 62 as quoted above. Section 42 of the English Bankruptcy Act is substantially identical with the provisions of our Act, and there the term ‘settlement’ has been given a broad interpretation. Those interested will find a reference to these decided cases in Halsbury, 2nd ed., vol. 2, para. 487. The broader interpretation is also supported by the following cases in the Courts of Canada. I refer to *In re Aliotis and Cliris* (1922), 3 C.B.R.

600; *In re MacKeen* (1928), 10 C.B.R. 311; *In re Cohen and Mahlin* (1927), 7 C.B.R. 655."

The word has been referred to in a large number of cases. One of those referred to in Halsbury, 2nd ed., vol. 2, sec. 487, is *Re Player, Ex parte Harvey* (1885), 15 Q.B.D. 682, where it was held that a gift of money to a son made for the purpose of enabling him to commence business on his own account was not a settlement of property within the English Act. At p. 685 Cave J. says:

"One must look at the whole of the language of the section in applying that definition, and consider what is meant by 'settlement'. Although 'settlement' by the 3rd subsection 'shall for the purposes of this section include any conveyance or transfer of property', yet I think the view of my brother Mathew is well founded, and that a settlement in the ordinary sense of the word is intended. The transaction must be in the nature of a settlement, though it may be effected by a conveyance or transfer. The end and purpose of the thing must be a settlement, that is, a disposition of property to be held for the enjoyment of some other person."

In re Vansittart, Ex parte Brown, [1893] 1 Q.B. 181, involved a gift of jewellery by the debtor to his wife as a present prior to his bankruptcy. Vaughan Williams J. at p. 182 says:

"It is extremely difficult to extract from the decided cases any clear definition of the transfers of property which will and which will not fall within the operation of this section." He quotes with approval the words of Cave J. in *Re Player (supra)*.

In *In re Tankard, Ex parte Official Receiver*, [1899] 2 Q.B. 57, the debtor had made over at a nominal rental a lease to a lady with whom he was on terms of intimacy and gave her considerable personal property. Wright J., holding the transaction was a settlement, says at p. 59:

"I think I am bound by the authority of *Re Player (supra)* and *In re Vansittart (supra)* to hold that that section applies only to such conveyances or transfer as are in the nature of settlement, in the sense of being dispositions of property by a person to be held and preserved for the enjoyment of some other person."

In re Plummer, [1900] 1 Q.B. 790, *Re Player (supra)* was approved, and the principles stated in *In re Vansittart* and *In re Tankard (supra)* were also approved.

Mr. Justice Masten in the *Trenwith* case also points out that the broader interpretation is supported by cases in the Courts of Canada and refers to *In re Aliotis and Cliris* (1922), 3 C.B.R. 600. This case involved a declaration of trust made by the debtor in favour of his wife. At p. 602 Chief Justice Harris says:

"I had some difficulty at first in reaching a satisfactory conclusion as to the meaning of the word 'settlement' as used in section 29(1), but I find it has been given a very wide meaning under the English Act, the language of which is virtually the same as our own."

In *In re MacKeen* (1928), 10 C.B.R. 311, where before bankruptcy the debtor transferred all his real property to his wife for an expressed nominal consideration, which was in fact about \$700.00, it was held that this transfer was clearly a settlement.

And lastly in *In re Cohen and Mahlin* (1926), 7 C.B.R. 655, where Mr. Justice Tweedie at pp. 666-7 says, after quoting the sections of The Bankruptcy Act in question:

"'Settlement' as here used means a disposition of property by the settlor either directly or through the intervention of a trustee, for the benefit of the person on whose behalf the settlement is made, subject to such restrictions and conditions as to the retention of the settled property in its original form, or in the case of money as to the investment thereof, as may be imposed by the settlor. The retention of the property in some form is contemplated and not intermediate alienation or consumption, the use and enjoyment thereof to be in accordance with the terms of the disposition. It is contended, however, on behalf of the plaintiff that the effect of subsec. 4 (which is now sec. 62(3)), is to extend the scope of subsec. 1, and that as a result the provisions of the latter subsection as to certain settlements being void apply to 'any conveyance or transfer of property' and are applicable in the present case as the payments constitute a transfer of property. That contention, in my opinion, is not correct. Both subsections must be read together. The words 'any conveyance or transfer' are qualified by the word 'settlement' as used in subsec. 1, and its provisions as to what is void must be limited to such conveyances and transfers as are in themselves settlements within the meaning of the word as above defined."

Although the transaction attacked involves the conveyance or transfer of property, it remains to consider whether or not

it was in the nature of a settlement. Counsel for the appellant urges that the giving of security to a trade creditor by way of chattel mortgage is not a "settlement" contemplated by the Act. He seeks to distinguish the facts here from those in cases where the person benefited was the wife, a son, daughter, or other relative, a person with whom the donor was intimate or friendly, or even a stranger. There was some discussion of sec. 64(1), and it might be argued that this section provided for the case of conveyances or transfers of property or charges thereon to creditors to the exclusion of sec. 60. It would seem that sec. 64 is aimed at preferences between creditors, while sec. 60 is aimed at the disposal by the debtor of his property by way of settlement. Furthermore, sec. 60, subsec. 3(b), should also be kept in mind. This provides:

"60. (3) This section shall not extend to any settlement made

"(b) in favour of a purchaser or encumbrancer in good faith and for valuable consideration."

I cannot hold this is not a settlement because the property in question was money paid without condition or restriction as to its disposition as in *In re Cohen v. Mahlin* (*supra*), and *Re Player* (*supra*). The giving of the mortgage constituted a disposition of property for the benefit of the defendant mortgagee subject to the restrictions and conditions as to the retention of the property as contained in the mortgage.

We were not referred to any case, nor have I been able to find one, where a conveyance by way of mortgage as security for indebtedness to a trade creditor under the circumstances here has been passed upon either in our Courts or in England. While much impressed by the submissions of counsel for the appellant, but keeping in mind the broad interpretation given to the word in the cases both here and in England and the limitation of the cases in which it has been held not to apply, I think it must be held that the mortgage in question did constitute a "settlement" within the meaning of sec. 60 of The Bankruptcy Act.

Being of this opinion, I think the learned trial Judge was right in remitting the matter for a new trial when it could be considered whether or not the mortgage in question was given in good faith and for valuable consideration.

Since writing this I have had the opportunity of reading the judgment of my Lord the Acting Chief Justice. I had overlooked

the fact that there was a cross-appeal. I agree with my Lord that the appeal and cross-appeal should both be dismissed, and without costs.

HENDERSON J.A. (dissenting):—This is an appeal from the judgment of the Honourable Mr. Justice Urquhart, varying the report of His Honour Judge Coughlin, Senior Judge of the County of Essex, on an issue directed to him.

I have had the privilege of reading the opinions of my Lord the Acting Chief Justice and of my brother Gillanders, in which the facts and the relevant sections of the Statute and the authorities are set forth and need not be repeated here.

With great respect I am unable to reach the same conclusion as my brethren. I refer particularly to the judgment in *Re Player, Ex parte Harvey* (1885), 15 Q.B.D. 682, and to the citation from the judgment of Cave J., also cited by my brother Gillanders. I am unable to agree that the transaction here attacked is in any sense a settlement of property, notwithstanding that it was effected by a conveyance or transfer. It appears to me to be an ordinary commercial transaction between a debtor and a creditor, and that it does not include any of the elements which one must find present in a settlement. This distinguishes this case, in my opinion, from *Re Trenwith*, [1934] O.R. 326, in which case the transaction attacked was held to be a settlement. This is also true of all the cases cited in which the transaction attacked has been set aside, so far as I know, and in my opinion in each and every of these cases the transaction has been one which was properly held to be in the nature of a settlement.

I do not think that the words of the Statute, “For the purpose of this section and sections sixty and sixty-one ‘settlement’ shall include any conveyance or transfer of property”, are intended to mean that “every conveyance or transfer of property” shall be deemed to be a “settlement”. It appears to me that the Act draws a clear distinction between settlements, though effected by a conveyance or transfer of property, and conveyances or transfers of property not in the nature of a settlement. Compare secs. 60, 61 and 62 with sec. 64 of the Statute.

In my opinion, therefore, the appeal should be allowed and the report of His Honour Judge Coughlin should be restored, and the appellant should have the costs of the appeal.

Appeal and cross-appeal dismissed without costs, HENDERSON J.A., who would allow the defendant’s appeal, dissenting.

[HOGG J.]

Re Rex v. Napier.

Municipal Corporations—Powers of Board of Police Commissioners—Validity of by-law of Board purporting to prohibit the distribution of handbills and circulars by leaving same in parked motor vehicles or by handing them to pedestrians—The Municipal Act, R.S.O. 1937, ch. 266, sec. 429.

Sec. 429 of The Municipal Act, R.S.O. 1937, ch. 266, empowers boards of commissioners of police in certain cities to pass by-laws "for licensing, regulating and governing bill posters, advertising sign painters, bulletin board painters, sign posters and bill distributors, and for prohibiting the posting up or distributing of posters, pictures or hand bills which are indecent or tend to corrupt morals."

Pursuant to the power conferred by sec. 429 of The Municipal Act a board of commissioners of police of a city passed a by-law as follows: "No bill distributor or other person shall distribute any handbill, circular or other paper (other than a newspaper or magazine) within the municipality by depositing the same in or upon motor vehicles parked or standing in any public place or by handing the same to pedestrians or others on the highways of the city."

Held, that the by-law was valid since it did not in its effect practically prohibit the trade of the class of persons with which it purported to deal. The by-law did not prohibit the distribution of hand bills at residences or other buildings and hence did not constitute a prohibition of the type of business covered by the by-law: *Re Karry and the City of Chatham* (1910), 21 O.L.R. 566, followed; *City of Toronto v. Virgo*, [1896] A.C. 88, and *Rex v. Mustin and Millard*, [1940] O.R. 393, distinguished.

AN appeal by the accused by way of a stated case from his conviction by Magistrate D. M. Brodie on a charge that he did distribute handbills contrary to sec. 10(d) of by-law No. 2 of the Board of Police Commissioners of the City of Windsor.

The appeal was heard by HOGG J. in Chambers at Toronto.

L. R. Cumming, for the accused, appellant.

L. Z. McPherson, for the informant, respondent.

December 21st, 1940. HOGG J.:—This is an application by way of appeal upon a case stated by D. M. Brodie, Police Magistrate for the City of Windsor pursuant to sec. 761 of The Criminal Code, respecting a charge laid against the appellant that he did on the 15th October, 1940, distribute handbills and other papers within the City of Windsor by handing the same to pedestrians on one of the streets of that city contrary to by-law No. 2, sec. 10(d), of the Board of Police Commissioners of the City of Windsor, and a subsequent conviction of the appellant after hearing before the said magistrate.

It was admitted by the appellant that this section of the by-law was purported to have been passed under the authority of sec. 429 of The Municipal Act, R.S.O. 1937, ch. 266. No mention

is made of the enabling section of the Statute in a preamble to the by-law.

It was also admitted, and is not in dispute, that the appellant did distribute handbills to persons on a street in the City of Windsor as set out in the charge.

The questions submitted by the magistrate for the decision of this Court are: (1) Was I right in convicting the accused of the offence charged upon the facts stated? and (2) Is that part of sec. 10, subsec. (d) of by-law No. 2 of the Board of Police Commissioners of the City of Windsor which purports to prohibit the act complained of beyond the powers conferred upon the said Board and therefore invalid?

Section 10(d) of by-law No. 2 as amended reads:

“(d) No bill distributor or other person shall distribute any handbill, circular, or other paper (other than a newspaper or magazine) within the municipality, by depositing the same in or upon motor vehicles parked or standing in any public place, or by handing the same to pedestrians or others on the highways of the city.”.

Section 429 of The Municipal Act provides that by-laws for the purposes enumerated in the section may be passed by boards of commissioners of police of cities having a population of not less than 100,000. It was admitted by counsel that the City of Windsor has a population of not less than 100,000 persons.

Subsection 1 of this section of the Statute which is headed, “Bill Posters”, reads:

“For licensing, regulating and governing bill posters, advertising sign painters, bulletin board painters, sign posters and bill distributors, and for prohibiting the posting up or distributing of posters, pictures or handbills which are indecent or tend to corrupt morals.”

It is only the first part of the section that is in issue in this application.

The question before me for determination therefore is: Is this by-law “a regulation” authorized by the Statute?

It was argued by counsel for the appellant that the effect of the by-law was to prohibit bill distributors from carrying on their trade or occupation and not merely to regulate or govern the business carried on by bill distributors. It was stated by counsel that persons in this trade distribute handbills at residences and other buildings in a municipality as well as by handing

such bills to pedestrians or others on the streets and by leaving them on or in motor cars parked on the streets or on other public places.

I have no evidence before me as to what proportion of the general distribution of handbills consists of handing them to persons on the streets or leaving them in or on motor cars. Counsel for the respondent stated that the by-law did not affect the business of bill distributing to so great an extent, nor was it so severe, that it could by any means be called a prohibiting of the business of bill distributing which consisted in the large part of distribution of bills from door to door at residences and other buildings.

In *Re Karry and the City of Chatham* (1910), 21 O.L.R. 566, in the Court of Appeal, it was said that in deciding as to what regulations are required in any particular city or district, the local authority to which the Legislature has entrusted the power, should naturally be the best judge, "and its discretion, honestly exercised, should not lightly be interfered with."

The authority which is cited in all cases of this nature, and one which establishes the principle to be followed, is that of *The City of Toronto v. Virgo*, [1896] A.C. 88, where the matter was considered by the Judicial Committee of the Privy Council. The judgment of the Privy Council was discussed at some length in *Karry and the City of Chatham*.

In *Toronto v. Virgo*, a by-law of the Corporation of the City of Toronto purported to prohibit hawkers or such like persons carrying on petty trades from prosecuting their calling or trade in eight of the busiest and most important thoroughfares in the City of Toronto. Lord Davey, who delivered judgment in this appeal, said that the real question was whether there was power to pass a by-law prohibiting hawkers from plying their trade at all in a substantial and important part of the city. The judgment states that a marked distinction must be drawn between the prohibition or prevention of a trade and the regulation or governance of it, and that a power to regulate or govern seems to imply the continued existence of that which is to be regulated or governed. The Privy Council found that the effect of the by-law was practically to deprive the residents of the most important part of the city from trading with the class of traders in question.

Lord Davey also said at p. 93: "No doubt the regulation and governance of a trade may involve the imposition of restrictions

on its exercise both as to time and to a certain extent as to place where such restrictions are in the opinion of the public authority necessary to prevent a nuisance or for the maintenance of order.”

The effect of the decision in *Toronto v. Virgo* is that a by-law is to be held to be *ultra vires* when its effect is practically to prohibit the trade of the class of persons with which it purports to deal: *Karry and City of Chatham*.

The appellant contends that the judgment in *Rex v. Mustin* and *Rex v. Millard*, [1940] O.R. 393, must be followed and, as a consequence, the by-law in issue in the matter now under consideration must be held to *ultra vires* of the Board of Commissioners of Police for the City of Windsor. *Rex v. Mustin* and *Rex v. Millard* came before the Court by way of motions to quash the convictions of the accused upon the charge that they unlawfully distributed pamphlets contrary to a by-law of the town of New Toronto. The judgment of Urquhart J. expresses the opinion that the by-law was passed under the authority of sec. 268 of The Municipal Act giving a municipal council power to pass by-laws for the health, safety, morality and welfare of the inhabitants of the municipality in matters not specifically provided for by The Municipal Act, and that the scope of the section is limited by the words “in matters not specifically provided by this Act.” The judgment refers to the fact that sec. 429 of The Municipal Act deals with the question of distribution of circulars, and points out that the power to license does not confer the power to prohibit. The *ratio decidendi* of this judgment appears to be that the by-law could not be enacted upon the authority of sec. 268 of the statute for the reason that sec. 429 gave specific power to legislate on this subject.

I take it that the remarks of the learned Judge with reference to sec. 429 of the statute are in the nature of *obiter* and not essential as a basis of his decision; also that the by-law in question before him was not aimed at the trade or calling of bill distributors as he stated that the Legislature intended sec. 429 to cover the distribution of posters, pictures or handbills.

Furthermore it would appear that Urquhart J., in stating that the power to prohibit must be exercised in the light of the principle laid down in *City of Toronto v. Virgo*, was referring to the power to regulate and govern the specific trade of bill posters given by sec. 429, and was not expressing an opinion upon the effect of the by-law before him which does not purport to be

aimed at the business or calling of any particular trade, but at an activity which might be engaged in as an incident to many trades.

Section 440 of the statute discussed in *Rex v. Mustin* and *Rex v. Millard* does not appear to have bearing on the question in issue in the matter before me.

The Board of Police Commissioners of Windsor apparently determined that the by-law in question was necessary and, upon such information as has been given by counsel, I think I must conclude that when bill distributors are prevented from handing bills to people on the streets or putting them in or on motor cars which may be parked upon the streets, the prevention of such activities in connection with this trade or calling is not of such a degree that it can be said to be practically a prohibition of the entire business or trade of bill distributors. There is still left to them the large field, which seems to me to constitute the greater part—or at least as great a part—of this business, namely, of leaving bills at the residences and other buildings in the municipality. It seems to me that practically the same object would be attained, at least to a very considerable extent, by this latter method of distribution as is accomplished by handing out bills to people on the streets and leaving them in or on parked motor cars, for the same persons, or the great majority of the same persons, would have these bills brought to their attention if they were left at the places of residence of such persons.

I am of opinion that the by-law cannot be held to prevent the exercise of the trade or calling of bill posters to the extent that it can be said wholly or practically to prohibit such trade or calling.

I find that the Board of Police Commissioners of the City of Windsor was empowered by The Municipal Act to pass that part of sec. 10, subsec. (d) of by-law No. 2, which is in question in this application, and that such part of the by-law is valid, and the Magistrate was right in convicting the appellant.

The costs of the motion should be to the respondent.

Appeal dismissed with costs.

[HOGG J.]

Re Rex v. Burt.

Criminal Law—Defence of Canada Regulations—"Loitering in the vicinity of a protected place" within meaning of Regulation 6—Picketing—Alleged industrial dispute—Applicability of saving provisions in Regulations 27 and 29—Principles of interpretation—The War Measures Act, R.S.C. 1927, ch. 206.

Regulation 6(3) of The Defence of Canada Regulations made under The War Measures Act, R.S.C. 1927, c. 206, provides that "no person loitering in the vicinity of a protected place . . . shall continue to loiter in that vicinity after being requested by the appropriate person to leave it."

Held (1) The provisos in Regulations 27 and 29 (which deal with the prevention of sabotage) that a person shall not be guilty of an offence under Regulation 27 or 29 by reason only of his taking part in or peacefully persuading any other person to take part in a strike, have no application to Regulation 6(3).

(2) A person who is actually loitering in the vicinity of a protected place within the meaning of Regulation 6(3) is guilty of an offence under that Regulation even though in so loitering he is picketing the protected place in the interests of those engaged in an industrial dispute.

AN appeal by George G. Burt, by way of a stated case, from his conviction by Magistrate Brodie at Windsor on a charge that the appellant did loiter in the vicinity of a protected place contrary to Regulation 6(3) of the Defence of Canada Regulations made under The War Measures Act, R.S.C. 1927, ch. 206.

The appeal by way of stated case was heard by HOGG J. in Chambers at Toronto.

J. L. Cohen, K.C., for the accused, appellant.

W. B. Common, K.C., for the Crown.

January 6th, 1941. HOGG J.:—This is an application by way of appeal upon a case stated by D. M. Brodie, Esquire, Police Magistrate for the City of Windsor, pursuant to secs. 761 and 765 of The Criminal Code.

The case stated sets out that on the 13th November, 1940, an information was laid charging that the appellant George G. Burt, did unlawfully loiter in the vicinity of premises for the performance of essential services, to wit, the premises of the Chrysler Corporation of Canada, Limited, situated on Drouillard Road in the City of Windsor, after being requested by the appropriate person to leave it, contrary to sec. 6, subsec. 3 of The Defence of Canada Regulations.

On the 19th November the charge was heard before the said Magistrate, who found the appellant guilty of the offence aforesaid, and convicted him thereof.

The questions of law submitted by the Magistrate for the determination of this Court, as amended on consent of the parties, are:

“(1) Does the conduct of the accused as adduced in the evidence before me justify the conclusion that the accused did ‘loiter’ within the meaning and terms of Regulation 6 of The Defence of Canada Regulations?”

“(2) Did the evidence support the conviction?”

By order of the Governor-General-in-Council of the 12th September, 1940, the Defence of Canada Regulations (Consolidation) 1940 were made and established by virtue of the powers conferred by The War Measures Act, R.S.C. 1927, ch. 206.

Part II of The Defence of Canada Regulations is headed: “Espionage and acts likely to assist the enemy”; “Access to certain premises and areas.”

Regulation 3(1) reads in part:

“If, as respects any premises, it appears to the Minister of Justice to be necessary or expedient, in the interests of the safety of the State or the efficient prosecution of the war, or for maintaining supplies and services necessary to the life of the community, that special precautions should be taken to prevent the entry of unauthorized persons, he may by order declare those premises to be protected places for the purposes of these Regulations; . . .”

Regulation 6(3) reads:

“No person loitering in the vicinity of a protected place, or any premises to which this regulation primarily applies or of any such vehicle, vessel or aircraft as aforesaid, shall continue to loiter in that vicinity after being requested by the appropriate person to leave it.”

Regulation 6(4) reads:

“The premises to which this Regulation primarily applies are premises used or appropriated

(a) for any of the purposes of His Majesty’s service or for the defence against, or protection from, an enemy, or

(b) for the performance of any essential services.”

Regulation 6(5) reads:

“In this regulation the expression ‘the appropriate person’ means—

- (a) Any person acting on behalf of His Majesty;
- (b) Any constable."
- (c)

Regulation 2(1)(d) defines the words "essential services" as "such services as may for the time being be declared by the Governor in Council to be essential for the prosecution of the war or to the life of the community."

By order-in-council of the 20th July, 1940, it is declared that the premises of the Chrysler Corporation of Canada, Limited, together with the premises of certain other manufacturing companies, are "essential services" within the meaning of Regulation 2(1)(d).

Evidence was given on behalf of the Crown before the Magistrate by Constable Thurston, a member of the Ontario Provincial Police, to the effect that on the 13th November, 1940, at about 7.15 o'clock in the morning, he saw the accused with twenty-four other men walking slowly up and down in front of the gate of No. 2 plant of the Chrysler Corporation of Canada, Limited, while employees of this company were going into the plant to work. The constable approached the group of men and informed them that by order-in-council the Chrysler plant had been declared an industry of essential services, that it was unlawful for anyone to loiter at or near the premises of the corporation, and he requested them to leave. He informed them if they did not do so they would be arrested. This warning was repeated twice. A short time afterwards the appellant informed Thurston and Sergeant Duncan, another Provincial Police officer who had in the meanwhile arrived at the scene, that the men in question would leave, and the appellant told the remainder of the group to be back at 12 o'clock noon. The twenty-five men then departed. At 12 o'clock noon, forty-six men, including the appellant, came to the same place and proceeded to walk again in the same place or area and in the same manner. They were stopped by Sergeant Duncan, who again read the terms of the order-in-council already referred to. The appellant asked the police officers to withdraw for five minutes, and the appellant consulted with the rest of the men, when the appellant informed the officers that the men had taken a vote and decided to remain. The police officers at twenty-five minutes past twelve o'clock noon placed the men in question under arrest.

The evidence given by the officers is that this group of men walked slowly up and down in front of the gate of the Chrysler plant upon a space some 180 feet long by 60 feet wide. The location of the area or place where the group of men were walking as described was about 40 feet from the fence around the Chrysler plant.

It was stated in evidence that the men in question did not appear to be going anywhere, but merely walked up and down in front of the Chrysler plant at a pace which was slower than is ordinarily used when a person is proceeding from one point to another. Thurston said that some of the men in the group asked persons going into the plant to join with them, and one of the group was heard to remark: "Don't go into work, come with us."

Police Constable Thurston stated that he anticipated that these men would be walking as stated at the time and in the place described; that he heard one of the men saying that they were picketing the premises in question, and that it was clear to the police officer that this was the reason why they were there; also that Burt was known to be an organizer of a trade union and that the other men were associated with him.

Police Officer Duncan gave evidence that he did not know whether there was a strike on at the Chrysler Corporation plant, but knew that there was some industrial dispute, and that it was this dispute that led this officer and other police officers and constables to be at this place when the appellant and his associates were arrested.

The appellant contends that the conviction by the magistrate is erroneous in point of law on the grounds: (1) that the word "loitering" in Regulation 6(3) cannot be given the meaning placed upon it by the Magistrate so as to include and embrace the actions of the appellant and his associates at the time of their arrest; and, (2) that the actions of the appellant and his associates were merely acts done as part of a strike by the employees of the Chrysler plant and were what has been termed, peaceful picketing of this plant, a legitimate and legal proceeding on the part of the appellant and those with him, and as such, the appellant and those with him are entitled to the protection given by the saving clause in Regulations 27 and 29.

In support of the above grounds counsel for the appellant submits that according to the common law rules applicable to

the interpretation of statutes, the word "loitering" must be given a meaning in accordance with the object of the statute and no broader than the statute, or in this case the regulation, essentially requires. This rule has been stated to be that statutes which limit or which extend common law rights must be expressed in clear and unambiguous language.

It is also submitted by counsel for the appellant that the word "loitering" must be so construed that it does not conflict with established legal rights which are not clearly terminated or abrogated by the regulations in review; in other words, that in the absence of express language, Parliament did not intend that the regulations should abrogate ordinary rules of law and must therefore be strictly construed.

The primary rule of construction to be applied in the interpretation of a statute is that its words and sentences must be construed in their ordinary and natural meaning unless the statute itself qualifies, modifies or alters such ordinary and natural meaning. If a word or words is or are ambiguous, the intention of Parliament must be sought first in the statute itself and the reasons for its enactment. What then is the object or purpose of the regulations under consideration? This question is answered by the language of Regulation 1, namely, "the measures which may be required to be taken for securing the public safety and the defence of Canada." The regulations were passed to meet a grave emergency by which not only the safety of the State but the liberty and freedom of the citizens therein are endangered. Regulation 1 clearly enacts that it is contemplated that the ordinary rights of individuals and of property as they exist in time of peace will necessarily be interfered with by the measures which may be required to be taken to secure the public safety and defence of Canada. Rights and privileges may be abrogated by the regulations but only in as slight a degree as possible without endangering the purpose of the regulations.

It was said by Anglin J. in the Supreme Court of Canada, in *Re Gray* (1918), 57 S.C.R. 150, an appeal arising out of The War Measures Act 1914: "We are living in extraordinary times which necessitate the taking of extraordinary measures." These words are even more applicable to-day. In this time of great danger and emergency, the executive has been clothed by Parliament with very wide and extensive powers with the object

and purpose of opposing, in as effectual a manner as possible, the objects of the enemy, and by so doing to preserve the freedom and liberties of the citizens of the Dominion.

The consideration to be kept before one in the interpretation of a statute or regulation framed to cope with the situation with which Parliament and the country is confronted in a time of national danger, cannot be expressed more clearly than in the words of the President of the Exchequer Court of Canada in *Spitz v. Secretary of State for Canada*, [1939] Ex. C.R. 162, where he said, at p. 166: “ . . . when you come to interpret Consolidated Orders, or any other war measure, the objects of the same must be held strictly in mind, and such measures must be given that construction which will best secure the end their authors had in mind. One must consider not only the wording of the war measures but also their purposes, the motives which led to their enactment, and the conditions prevailing at the time. In time of war particularly the substance of things must prevail over form, and usually all technicalities must be swept aside.”

In the House of Lords in *The King v. Halliday*, [1917] A.C. 260, Lord Atkinson said, at p. 271: “However precious the personal liberty of the subject may be, there is something for which it may well be, to some extent, sacrificed by legal enactment, namely, national success in the war, or escape from national plunder or enslavement. It is not contended in this case that the personal liberty of the subject can be invaded arbitrarily at the mere whim of the Executive. What is contended is that the Executive has been empowered during the war, for paramount objects of State, to invade by legislative enactment that liberty in certain states of fact.” This principle was also discussed by Lord Haldane in *Fort Frances Pulp & Power v. Manitoba Free Press*, [1923] A.C. 695.

The heading of Part II of the Regulations, of which Regulation 6 is a part, is of assistance in determining the meaning of the word “loitering.” This part of the Regulations is for the purpose of preventing spying upon and obtaining information of activities carried on in premises, *inter alia*, declared to be “a protected place” where services essential to the war effort of the country are being carried on. It is designed to keep unauthorized persons out of, and away from, the vicinity of such

protected places so that information which might be of assistance to the enemy cannot be obtained.

The evidence shows that a group of men, at one time 25 in number, and later in the same day, 46 in number, among whom was the appellant, walked slowly up and down within a comparatively restricted space in front of the gate of and at a short distance from the Chrysler plant without showing any ostensible purpose, and not apparently proceeding anywhere.

I can find nothing in the Regulations as a whole which modifies or alters the natural meaning of the word "loitering", subject to consideration of the argument advanced on behalf of the appellant as to the effect of Regulations 27 and 29.

The meaning of the word "loiter" according to the Oxford Dictionary is: "To linger unduly on the way when sent on an errand or when making a journey; to linger idly about a place; to waste time when engaged in some particular task; to dawdle."

It was argued that the group of men in question could not be held to be loitering as they had the definite purpose in mind, because a strike or industrial dispute existed among the employees or some of them in the Chrysler Corporation plant, of picketing the plant in question, and that to carry out such purpose required them to walk slowly up and down in front of the Chrysler plant.

The only evidence that a strike or industrial dispute existed in the Chrysler company premises is the statement of a police officer that he was aware that an industrial dispute was being carried on in this plant and that he had heard one of the men in this crowd say that this was so. This officer also stated that the industrial dispute was the reason for a number of police constables being present near the premises. He furthermore said that he knew the appellant Burt was an organizer of the trade union with which the group of men with him were associated. There is no evidence which connects the appellant and those with him with the employees alleged to have been on strike in the Chrysler plant or that they were members of any trade union of which the employees of the Chrysler plant may have been members other than the statement that the accused were picketing the premises.

But assuming that picketing in the interests of those engaged in an industrial dispute was the purpose of the actions of the appellant and the others with him upon this occasion, the means

or manner at the time and place when this picketing was carried out was, in my view, an act of loitering within the meaning of that word in Regulation 6.

The fact that the men in question were "loitering" is the essential act which the Regulation is intended to prevent although by so doing it may be necessary to hinder or even to prohibit an act which might be carried out in peace time by means of loitering. The purpose of the Regulation must be the paramount consideration.

In Part II of the Regulations, under the heading of "Sabotage" and "Misrepresentation", is found Regulation 27 which is to the effect that no person shall do any act with intent to impede the working of any machinery or apparatus of warfare, or any undertaking engaged in the performance of essential services: "Provided that a person shall not be guilty of an offence under this regulation by reason only of his taking part in, or peacefully persuading any other person to take part in, a strike."

Regulation 29, under the same heading, prohibits interference with the duties of members of His Majesty's forces, or interference with the work of persons engaged in the performance of essential services, and the Regulation prohibits any person doing any act with intent to render persons engaged in essential services from efficiently carrying out the work on which they are engaged: "Provided that a person shall not be guilty of an offence under this regulation by reason only of his taking part in, or peacefully persuading any other person to take part in, a strike."

Mr. Cohen contends that the provisoes in these Regulations extend to, and their saving effect must be applied to, those persons who may infringe the terms of Regulation 6 where the acts which constitute such infringement are part of recognized proceedings in carrying on an industrial dispute or strike; that is to say, that persons who are engaged in the peaceful picketing of a protected place, although they may be loitering in the near vicinity of such place, nevertheless as picketing of this nature is one of the means of carrying on a strike, are not guilty of an offence against the terms of Regulation 6.

Regulations 27 and 29 provide for entirely different circumstances than does Regulation 6. They are primarily designed to prevent sabotage, that is, injury or destruction of implements of war and to prevent attempts to slow down production of war

supplies by interfering with the workers engaged in making such supplies.

Regulations 27 and 29 deal with the internal working of plants producing material for the fighting services and are not concerned with espionage which may be carried on from outside of the protected premises.

The effect of an excepting proviso is referred to in the following terms by Craie's Statute Law, 3rd ed., 194:

"The effect of an excepting or qualifying proviso, according to the ordinary rules of construction, is to except out of the preceding portion of the enactment, or to qualify something enacted therein, which but for the proviso would be within it; and such a proviso cannot be construed as enlarging the scope of an enactment when it can be fairly and properly construed without attributing to it that effect."

In support of this rule, *West Derby Union v. Metropolitan Life Assurance Society*, [1897] A.C. 647, is referred to.

I cannot hold that the right to strike reserved by Regulations 27 and 29 can be held to be applicable to, or to qualify or limit in any way, either directly or by implication, the terms of Regulation 6.

Question 1, which has been substituted for the original question asked by the Magistrate, is answered in the affirmative.

Question 2 is answered in the affirmative.

By sec. 765 of the Code costs may be awarded, but I think in the circumstances there should not be costs.

Appeal dismissed.

[COURT OF APPEAL.]

Dowker et al. v. Thomson.

Mortgages—Action on covenant and for foreclosure—Final order of foreclosure—Writ of fi. fa. filed with sheriff—Possession of lands by mortgagee—Subsequent sale of lands by municipality for arrears of taxes—Motion by mortgagor to set aside writ of fi. fa.

The defendant mortgaged to the plaintiffs certain lands situate in the town of Fort Frances. The defendant having defaulted in the payments under the mortgage, the plaintiffs issued a writ of foreclosure, and on July 14th, 1933, the plaintiffs signed default judgment for foreclosure and for the sum of \$1,903.57 on the covenant. A writ of *fi. fa.* was issued to the sheriff on October 30th, 1933, and the plaintiff took out a final order of foreclosure on the 30th of January, 1934, and then went into possession of the property. At the time of the final order there were arrears of taxes amounting to about \$700.00. The plaintiffs neglected to pay any taxes as they accrued and made no payments on arrears. As a result there was owing for taxes the sum of \$1,342.48 when the town of Fort Frances advertised the property for sale for taxes, and at the tax sale the town itself became the purchaser. The writ of *fi. fa.* lapsed in October, 1936, but an alias writ was issued on March 17th, 1937, after the tax sale had taken place.

The defendant moved for an order setting aside the writ of *fi. fa.* and it was held by the Court of Appeal that the writ of *fi. fa.* should be set aside.

After foreclosure the mortgagee, in order to be entitled to recover payment of the mortgage debt from the mortgagor by virtue of the covenant in the mortgage, must be in a position to reconvey the mortgaged property. The mortgagee cannot invoke a suggested exception that this rule does not apply where the property was lost through the act or default of the mortgagor. Once a final order has been taken out it is difficult to conceive how the property can subsequently be lost through any act or default on the party of the mortgagor. Even though the taxes were substantially in default when the final order was taken out, the plaintiffs must be presumed to have known that such was the condition and they accepted it. When they took out the final order the plaintiffs elected to take the property subject to maintaining it in position to reconvey if they realized on the writ of *fi. fa.* and they cannot have both the property and the money. There was nothing the defendant could have done and nothing he was obliged to do towards payment of taxes after the final order of foreclosure.

AN appeal by the defendant, pursuant to leave granted by Chevrier J., from an order of Greene J. dismissing a motion by the defendant for an order setting aside a writ of *fi. fa.*

February 4th, 1941. The appeal was heard by RIDDELL, McTAGUE and GILLANDERS JJ.A.

C. L. Yoerger, for the defendant, appellant.

A. A. Macdonald, K.C., for the plaintiffs, respondents.

February 20th, 1941. The judgment of the Court was delivered by McTAGUE J.A.:—The defendants moved before the Honourable Mr. Justice Greene for an order setting aside a writ of *fi. fa.* at Fort Frances, the *fi. fa.* having followed from

a judgment on the covenant to pay in a mortgage action. Mr. Justice Greene dismissed the motion by order dated 9th day of November, 1940. From this order the defendant appeals by leave of the Honourable Mr. Justice Chevrier.

On the 15th day of June, 1929, the defendant borrowed from the plaintiffs the sum of \$1,700, on the security of a first mortgage on a dwelling-house property in Fort Frances. At the time the mortgage was given there were considerable arrears of taxes on the property which the defendant did not pay, although it is alleged he agreed to do so out of the mortgage moneys. Some payments in taxes were made, but further taxes accumulated. On the 20th day of June, 1933, the plaintiffs issued a writ of foreclosure. Default judgment was signed on the 14th day of July, 1933, for foreclosure, and for the sum of \$1,903.57 on the covenant and for interest and costs. A writ of *fi. fa.* was issued to the sheriff on the 30th day of October, 1933. Final order of foreclosure was taken out on the 30th day of January, 1934, and the plaintiffs went into possession.

At the time of the final order there were arrears of taxes amounting to approximately \$700. The plaintiffs neglected to pay any taxes as they accrued and made no payments on arrears. They were in receipt of a little revenue. They made some repairs but what little surplus was left they kept for themselves. As a result there was owing for taxes \$1,342.48 when the town of Fort Frances advertised the property for sale for taxes. At the tax sale the town itself became the purchaser.

In the meantime the writ of *fi. fa.* lapsed in October, 1936, but an alias writ was issued on March 17th, 1937, after the tax sale had taken place. It seems significant that between October, 1936, and March 17th, 1937, there was no writ of *fi. fa.* and therefore no right through the existence of such writ to the defendant to redeem.

The plaintiffs conceded in argument that after foreclosure a mortgagee, in order to be entitled to recover payment of the mortgage debt from the mortgagor by virtue of the latter's covenant in the mortgage, must be in a position to reconvey the mortgage property. While conceding this to be the general rule, they contended that it did not apply where the property was lost through the act or default of the mortgagor, and asserted that that was what happened in this case.

With respect, I do not think we can give effect to the argument. The exception which the plaintiffs put is one having to do with when a mortgagee is disentitled to sue on the covenant, rather than an exception to realizing upon the covenant after foreclosure. Once the final order has been taken out it is hard to conceive how the property can subsequently be lost through any act or default on the part of the mortgagor. It is true that taxes were substantially in default when the final order was taken out. The plaintiffs must be presumed to have known that such was the condition and have accepted it. After they themselves took possession they allowed further taxes to become in default, and as a result the property was sold by the municipality. When they took out the final order they elected to take the property subject to maintaining it in position to reconvey if they realized on the writ of *fi. fa.* They cannot have both the property and the money. They took their chances on realizing on the security, and now the security has been lost. There was nothing the defendant could have done and nothing he was obliged to do towards payment of taxes after the final order.

It seems to me that the general rule which is discussed in *Falconbridge on Mortgages*, 2nd ed., pp. 421-423, must prevail. I make particular reference to *Gordon Grant & Co. v. Boos*, [1926] A.C. 781.

The appeal should be allowed and the writ of *fi. fa.* set aside. The defendant should have the costs of the appeal and of the motions below.

Appeal allowed with costs.

[COURT OF APPEAL.]

Smiley v. The City of Ottawa.

Negligence—Municipal corporations—Construction of a sewer—Blasting—Damage to plaintiff's premises—Statutory authority—Whether damage to plaintiff's premises inevitable result of that which was authorized by statute—Whether plaintiff entitled to relief by action or by claim for compensation under sec. 347 of The Municipal Act, R.S.O. 1937, ch. 266.

The plaintiff brought this action against the defendant municipal corporation for compensation for damage done to the plaintiff's premises by blasting operations carried on by the defendant in the course of the construction of a sewer. The by-law authorizing the construction of the sewer was passed by the council of the defendant corporation pursuant to the powers conferred by sec. 404(7) of The Municipal Act, R.S.O. 1937, ch. 266, which authorizes municipalities to pass by-laws "for constructing, maintaining, improving, repairing, widening, altering and stopping drains, sewers or watercourses".

Held that the plaintiff for the following reasons was entitled to recover damages in the action:

- (1) The defendant had not established that the damage to the plaintiff's property was the inevitable result of that which was authorized by sec. 404(7) of The Municipal Act.
- (2) The plaintiff was not compelled to seek his relief by way of a claim for compensation under sec. 347 of The Municipal Act because the damage did not result from a specifically authorized work itself but rather from the method of doing the work which was in the discretion of those doing the work: *McCurdy v. Township of Bayham*, [1935] O.R. 271, distinguished.

AN appeal by the defendant from the judgment of His Honour Judge Smiley, of the County Court of the County of Carleton, whereby the plaintiff was awarded damages in the sum of \$250 and costs.

February 5th, 1941. The appeal was heard by RIDDELL, MCTAGUE and GILLANDERS JJ.A.

F. B. Proctor, K.C., for the defendant, appellant.

J. W. York, K.C., for the plaintiff, respondent.

February 20th, 1941. RIDDELL J.A.:—This is an appeal from the judgment of His Honour Judge Smiley, of the County Court of the County of Carleton in an action, by which he awarded the plaintiff damages to the amount of \$250 and costs.

The important facts are few and practically admitted. They may be stated thus: The City of Ottawa considered that it had occasion to remove certain rocks in constructing a sewer, and in doing so by blasting damage was caused to the plaintiff's premises by the resultant vibrations necessarily caused by the blasting. The plaintiff claims that these vibrations might have been avoided by digging a hole and putting in steel wedges. This is not denied but is sworn to by the city's engineer. The answer

of the city is that this method would cost very much more, and that the method adopted did not give a cause of action, being carried on under statutory authority.

The learned trial Judge pointed out that there was no by-law proved authorizing this work; but assumed that there was. He also assumed that the work was done under statutory authority; but thought that the city was, nevertheless liable. I, making the same assumptions, am clearly of the opinion that the judgment was right. Many cases are to be found in our Courts laying down the principle that work done under statutory authority must be done without negligence. Certain dicta are to be found in other Courts that the method pursued must be the safest; it is not necessary to go that far, and I am not prepared to accept the dicta—there may be several courses equally safe.

But such work must be done so as to interfere as little as is reasonably possible with the rights of others; and I agree with the opinion apparently held by my brother Henderson in *Bower v. Richardson Construction Co.*, [1938] O.R. 180, that greater expense is no excuse—unless, indeed, the greater expense would be practically prohibitive. I wholly adopt the opinion of Viscount Dunedin in *Manchester Corporation v. Farnworth*, [1930] A.C. 171, at p. 183: “When Parliament has authorized a thing to be made or done in a certain place, there can be no action for nuisance caused by the making or doing of that thing if the nuisance is the inevitable result of the making or doing so authorized. The onus of proving that this result is inevitable is on those who wish to escape liability. . . .” Replace the word “nuisance” by the word “damage” and we have the present case. Here the city did something which it claims statutory authority for; and if that damage were inevitable, it would escape liability—but it must prove that it was inevitable and that it has not done, but rather the contrary.

It would seem unnecessary to cite further authorities, they are uniform. I would dismiss the appeal with costs throughout.

GILLANDERS J.A.:—I have had the privilege of reading the judgment of my Lord the Acting Chief Justice and am in agreement with his reasons and result. I only desire to add a word as to the submission of counsel for the appellant, that in any event the plaintiff is in the wrong forum and should seek

relief by way of a claim for compensation under sec. 347 of The Municipal Act; in other words, that if any damage has been caused by the work in question it is injurious affection resulting from the legal exercise of the statutory powers of the corporation for which the plaintiff might make a claim for compensation under the provisions of The Municipal Act.

There is statutory authority as pointed out by the learned trial Judge in sec. 404(7) of The Municipal Act authorizing the municipality to pass by-laws "for constructing, maintaining, improving, repairing, widening, altering and stopping up drains, sewers or watercourses," and so forth. Assuming, as we are told, that the by-law was passed in pursuance of this statutory authority, it is to be noted that the authority conferred on the municipality is permissive in its terms. In *Guelph Worsted Spinning Company v. City of Guelph* (1914), 30 O.L.R. 466, Middleton J.A. refers to a number of authorities, and states at p. 474:

"If the very thing authorized necessarily interferes with the common law rights of others, then there can be no right of action, and one expects to find in the statute some provision for compensation; but the absence of such a provision does not create a right of action; it only suggests the more careful scrutiny of the Act to ascertain whether the real intention of the Legislature was to permit the interference with private rights without compensation.

"In accordance with this principle, it has been laid down that where the Legislature has conferred authority by an Act which is permissive in its terms, there is no authority to ignore the common law rights of others."

It should further be noted that the damage in this case resulted from the method of doing the work and not from the work itself.

This is not a case of damage resulting from a specifically authorized work but from the method of carrying it out which was in the discretion of those doing the work.

In *McCurdy v. The Township of Bayham*, [1935] O.R. 271, the plaintiff sued for damages for the flooding of his lands caused by the defendant township diverting the natural course of the channel of a stream above his property thereby materially increasing the flow of water on his lands. The trial Judge and a majority of the Court of Appeal held that what was done (that

is, the diversion of the stream), was within the powers of the defendant corporation conferred by statute and that the plaintiff must look to arbitration for any compensation for his damage. It should be noted that the damage resulted from the work itself which the corporation did under statutory authority and not from the method of carrying it out. Here the damage is said to result from the method adopted in the discretion of the defendant in doing the work, and, as pointed out by my Lord, it not having been established that the plaintiff's damage was the inevitable result of what was specifically authorized, the plaintiff is entitled to his remedy by action.

McTAGUE J.A. agreed with GILLANDERS J.A.

Appeal dismissed with costs.

[COURT OF APPEAL.]

Rex v. Bower.

Criminal law—Criminal negligence—Degree of negligence by accused which will warrant a conviction under sec. 284 of The Criminal Code, R.S.C. 1927, ch. 36—Negligence in operation of a motor-boat—Appeal by Crown from acquittal of accused—District Court Judges Criminal Court—Right of appeal—Question of fact.

There is no degree of criminal negligence which will warrant a conviction under sec. 284 of The Criminal Code, R.S.C. 27, ch. 36, which is not of that high degree that is termed gross negligence and would support a charge of manslaughter if death resulted: *Rex v. Greisman* (1926), 59 O.L.R. 156, and *Rex v. Baker* (1928), 63 O.L.R. 275, [1929] S.C.R. 354, followed; *Andrews v. Director of Public Prosecutions*, [1937] A.C. 576, distinguished; dictum in *Rex v. Carr*, [1937] O.R. 600, not followed.

AN appeal by the Attorney-General for Ontario from the judgment or verdict of acquittal by His Honour Judge Popham on the trial of the respondent in the District Court Judges' Criminal Court of the District of Kenora on a charge of causing grievous bodily injury to Lucinda Grace Crawford by negligently omitting to keep a motor boat, of which he was the driver, under proper control.

February 17th and 18th, 1941. The appeal was heard by ROBERTSON C.J.O., MIDDLETON and MASTEN JJ.A.

W. B. Common, K.C., for the Crown, contended that on the evidence the learned trial Judge had erred in not finding that the negligence of the accused was of the grossest type involving a moral element and a wanton or reckless indifference to the lives and safety of others.

In the alternative if the negligence of the accused was not of the grossest type nevertheless it was sufficiently culpable to justify a conviction under sec. 284 of The Criminal Code. The decision in *Andrews v. Director of Public Prosecutions*, [1937] A.C. 576, has modified the requirements of the type of culpable negligence required to be shown for conviction under sec. 284 as laid down in *Rex v. Greisman* (1926), 59 O.L.R. 156: see *Rex v. Carr*, [1937] O.R. 600.

D. L. McCarthy, K.C., and *K.-G. Morden*, for the accused, respondent, contended that on the evidence the learned trial Judge was right in finding that the accused was not guilty of gross negligence involving a wanton or reckless indifference to the lives and safety of others. At all events under sec. 1013(4) of the Code, the Attorney-General has no right of appeal on a question of fact or of mixed law and fact.

As to the degree of negligence necessary to justify a conviction under sec. 284 of the Code the law is still as expressed in *Rex v. Greisman* (1926), 59 O.L.R. 156, and *Rex v. Baker* (1928), 63 O.L.R. 275. The matter is not affected by *Andrews v. Director of Public Prosecutions*, [1937] A.C. 576; there the House of Lords was distinguishing between the degree of negligence necessary to support a conviction for manslaughter and the negligence necessary to support a conviction under sec. 11 of The Road Traffic Act (dangerous driving). The discussion of the matter in *Rex v. Carr*, [1937] O.R. 600, was purely *obiter*.

Cur. adv. vult.

February 27th, 1941. The judgment of the Court was delivered by ROBERTSON C.J.O.:—This is an appeal by the Attorney-General for Ontario against the judgment or verdict of acquittal by His Honour Judge Popham on the trial of the respondent before him, in the District Court Judges' Criminal Court of the District of Kenora, on a charge of causing grievous bodily injury to Lucinda Grace Crawford by negligently omitting to keep a motor-boat, of which he was the driver, under proper control.

The respondent, when passing Minaki Inn on the Winnipeg River in a motor-boat, ran over Miss Crawford, who was swimming in the river off the inn, causing her grave injuries.

At the close of the case for the prosecution respondent's counsel moved for the dismissal of the charge, and, after consideration, the trial Judge granted the motion. He held that while there was evidence that the respondent was negligent, the evidence did not warrant a finding of that degree of negligence necessary to support a conviction under sec. 284 of the Criminal Code, under which he was charged. In reaching this conclusion the learned Judge reviewed a number of the recent decisions upon criminal negligence, and held that to convict under sec. 284 the negligence proved must be of that wanton or reckless kind that is often called "gross negligence", and such as would warrant a conviction for manslaughter if death had resulted.

The appeal was rested upon two grounds: (a) that there is a degree of criminal negligence that will warrant a conviction under sec. 284 of the Criminal Code, and yet is not of that high degree that is called "gross negligence" and is necessary to support a charge of manslaughter; (b) that in any event the

trial Judge erred in deciding that the evidence did not warrant a finding of "gross negligence".

In support of the first ground of appeal counsel for appellant relied mainly upon certain dicta in the judgments in *Andrews v. Director of Public Prosecutions*, [1937] A.C. 576, and *Rex v. Carr*, [1937] O.R. 601, and the argument centred upon the question whether what was said in these cases is applicable here.

In the two cases referred to, the negligence charged was in the operation of a motor vehicle, and it is not contended that a motor-boat is a motor vehicle. It was contended, however, that these cases are authority for the proposition, of general application in charges based upon negligence, that there is a degree of negligence, criminal in its nature, but not amounting to gross negligence nor to that degree of negligence necessary to support a charge of manslaughter. These cases were carefully reviewed by the learned trial Judge in his considered judgment, and he rejected the contention. We are of opinion that in this he was right.

It is quite true that in the case of *Andrews v. Director of Public Prosecutions* it was very plainly said that the offence of dangerous driving may be committed though the negligence is not of such a degree as would amount to manslaughter if death ensued, but the offence so spoken of is the statutory offence created by sec. 11 of the Road Traffic Act (1930). This section is similar in terms to subsec. 6 of sec. 285 of our Criminal Code, enacted in 1938 by 2 Geo. VI, ch. 44, sec. 16. There is nothing in the judgment in the *Andrews* case to warrant the extension of the general principles of the law of criminal negligence in the manner now contended for. That case is concerned only with the law applying to motor vehicles.

In *Rex v. Carr* the *Andrews* case is cited in the judgment as authority for the dictum that appellant now quotes from the *Carr* case. There are, however, important distinctions between the *Carr* case and the *Andrews* case. The *Andrews* case was an appeal from conviction for manslaughter and it was said that this required proof of a higher degree of negligence than that necessary to support a charge under the Road Traffic Act, already referred to. There was no similar statute in force in Canada when the *Carr* case was decided, and the dictum found in it purports to be a statement of the general law applicable to charges under sec. 284 of the Criminal Code, under which the

charge in the *Carr* case was laid. What was said in the *Carr* case appears, therefore, to be directly relevant to the present charge, although, with respect, it must be said that it would appear to have been based upon a misunderstanding of the *Andrews* case. The *Carr* case was, however, only an appeal by the Crown from sentence. The conviction was not in question as it was in the *Andrews* case, and the Court had not to decide any question of the degree of negligence necessary to support the conviction. The dictum in the *Carr* case must, therefore, be regarded as purely obiter. It is not supported by the decision in the *Andrews* case, upon which it was founded, and it cannot, therefore, be regarded as a statement of the law binding on this Court or that we ought to follow.

In the result the law to be applied in a prosecution under sec. 284 of the Criminal Code is still the law as laid down in *Rex v. Greisman* (1926), 59 O.L.R. 156, and *Rex v. Baker* (1928), 63 O.L.R. 275, [1929] S.C.R. 354, and in many other cases.

Counsel for appellant strongly argued that the trial Judge was wrong in deciding that he could not find upon the evidence negligence of that high degree that is termed "gross negligence". Counsel for respondent objected that this did not raise any question of law, but was a question of fact as to which no appeal to this Court may be taken by the Attorney-General under sec. 1013 of the Criminal Code. We are of opinion that the objection must prevail. This is not a case of a trial by jury where the ruling of the trial Judge that there is no evidence to submit to the jury is a ruling on a matter of law. Here the trial Judge is himself the judge of the facts, and he has decided on the evidence that there was not gross negligence. That is beyond doubt a question of fact. It is such a question as is every day left by the trial Judge to the jury to be answered. There is nothing on the record here to suggest that the Judge made any error in law, or, as it is sometimes expressed, "misdirected himself", in reaching his conclusion that there was not gross negligence.

We are far from holding the view that the trial Judge might not well have reached the opposite opinion as to the degree of negligence that caused the serious injuries suffered in this case. The evidence for the defence was not heard, but if, upon the facts disclosed in the evidence for the prosecution, the trial

Judge had ruled that a case had been made and that it was necessary for the accused to make any defence he had, that ruling would have been difficult to reverse on the ground that there was no evidence to support it. The trial Judge having, however, decided the question of fact in favour of the defence, it is beyond the jurisdiction vested in this Court to interfere.

The appeal must, therefore, be dismissed, but we think it not amiss to call attention to a state of the law that provides no punishment for culpable negligence such as in the opinion of the trial Judge is revealed by the evidence in this case, even if it amounts to negligence only in the lesser degree found by him. Navigable waters are free to all and no part of them forms a special preserve for the pleasure of owners of fast motor-boats. It will be matter for regret if that watchfulness, and care for the rights and safety of others that have been traditional in all navigation, give place, especially in the narrow limits of our inland waters, to the craze for speed and the callous disregard of all courtesy and care for the safety of others that so strongly mark motor traffic on our highways.

Appeal dismissed.

[COURT OF APPEAL.]

Royal Bank of Canada v. Lambton Loan and Investment Co.

Mortgages — Distress — Attornment clause — Whether land mortgage under mortgage containing attornment clause can distrain goods on mortgaged premises which are covered by a chattel mortgage to another person—The Landlord and Tenant Act, R.S.O. 1937, ch. 219, sec. 30—The Mortgages Act, R.S.O. 1937, ch. 155, sec. 12.

Section 12 of The Mortgages Act, R.S.O. 1937, ch. 155, provides that the right of a mortgagee of land to distrain for interest in arrear shall be limited to the goods and chattels of the mortgagor.

Held that sec. 12 of The Mortgages Act applies not only where a mortgagee has a license to distrain but also where the mortgage contains an attornment clause creating the relationship of landlord and tenant between the mortgagee and the mortgagor; the section applies to every case in which the mortgagee, whether in the character of landlord or licensee, but still under and for the purposes of the mortgage, has the right to distrain. Hence a mortgagee of land under a mortgage containing an attornment clause can not distrain for interest goods on the mortgaged premises which have been mortgaged by way of chattel mortgage to a third person: *Edmonds v. Hamilton Provident & Loan Society* (1891), 18 O.A.R. 347, followed.

AN action to determine the rights of the parties with respect to certain goods and chattels distrained by the defendant.

The action was tried by MAKINS J., without a jury, at Sarnia. R. W. Gray, K.C., and W. L. Millman, for the plaintiff.
H. E. Fuller, K.C., and D. P. Jamieson, for the defendant.

December 31st, 1940. MAKINS J.:—On the 16th November, 1935, the defendant sold to one Joseph L. Mills, Lot No. 10 in the 1st Concession of the Township of Sarnia containing 200 acres for \$6,000.00, receiving \$1,000.00 in cash and a mortgage for the balance of \$5,000.00. In addition to the usual mortgage clauses the mortgage contained an attornment clause as follows:

“Without prejudice to the mortgagee’s right to immediate possession of said lands on default, or to the right of subsequent mortgagees to take possession, the mortgagor doth attorn and become tenant at will thereof to the mortgagees from the date hereof at a rental equivalent to, payable on the days for payment of, and applicable when received in satisfaction of the interest hereby reserved, such tenancy being terminable without notice to quit in case of default. Provided the mortgagees may in default of payment or breach of any of the covenants hereinbefore contained, enter on the said lands and determine the tenancy hereby created without notice.”

On the 22nd March, 1939, the said Mills was indebted to the plaintiff bank in the sum of \$7,711.25, and as security for repay-

ment of same gave to the plaintiff a chattel mortgage for \$2,500.00 covering certain of his chattels situate on said premises. The said chattel mortgage was filed with the clerk of the County Court of the County of Lambton on the 23rd day of March, 1939, and a renewal statement was duly filed at the office of the said clerk on the 16th March, 1940, and there is no dispute as to the validity of same.

On the 24th day of July, 1940, there was owing upon the land mortgage to the defendant the sum of \$5,000.00 for principal and \$811.80 for interest, all of which interest was past due and in arrears.

On the said 24th day of July there was owing upon the chattel mortgage to the plaintiff the sum of \$1,765.02 and interest from the 28th of February, 1940. On the said 24th July, 1940, under the terms of the attornment clause, the defendant distrained the goods and chattels of the said Mills, including certain of the goods and chattels included in the said chattel mortgage to the plaintiff, for the sum of \$811.80 as rent due and unpaid, such rent being the amount of interest in arrears according to the statement filed as Schedule "C". At the time of the said seizure and sale the said goods and chattels were in the possession of Mills and upon the lands described in the said mortgage. It is admitted by both parties that of the goods and chattels so distrained and sold by the defendant, goods and chattels to the value of \$523.00 were goods and chattels covered by the plaintiff's chattel mortgage, and by agreement between the parties the defendant has paid into court the said sum to abide the result of this action. The question at issue, therefore, is whether or not, the relationship of landlord and tenant being established, sec. 30 of The Landlord and Tenant Act, R.S.O. 1937, ch. 219, applies in favour of the defendant so as to enable it to distrain not only the goods and chattels of the mortgagor but also of his assigns, or whether or not the mortgagee's right is limited by sec. 12 of The Mortgages Act; and, if so, what are the rights under that section?

In the case of *Edmonds v. Hamilton Provident & Loan Society* (1891), 18 O.A.R. 347, a mortgage with a similar attornment clause was dealt with. The mortgagor had rented the farm to one Leslie Edmonds, and in distraining the goods of the mortgagor, the goods of Leslie Edmonds were also distrained, and Mr. Justice

Osler, giving judgment in accordance with the majority of the court, has this to say (p. 358) :

"The plaintiff Leslie Edmonds stands in a different position. The power to distrain for arrears of instalments is at most a mere licence under which the defendants could not justify the seizure of any goods but those of the licensors. The same may be said of the power contained in the short statutory form to distrain for arrears of interest which in this Court and in the Supreme Court has been held, even where found in connection with an attornment clause, not to confer upon the mortgagees the rights of a landlord"; and he cites *Trust & Loan Co. v. Lawrason* (1882), 10 S.C.R. 679; and after referring to sec. 16 of The Mortgages Act (now sec. 12), which expressly enacts that the right of the mortgagee to distrain for interest in arrear shall be limited to the goods and chattels of the mortgagor, he goes on to say:

"This section has also, I think, the effect of limiting in the same way any right of distress which the mortgagees might otherwise have had under another clause in the mortgage by which the mortgagors 'attorn to and become tenants at will to the mortgagees, at a rent equal in amount to the interest reserved, payable at the time mentioned in the proviso' . . . I think the intention was to reach every case in which the mortgagee, whether in the character of landlord or licensee, but still under and for the purposes of the mortgage, had the right to distrain. The section is wide enough to cover every case, and I cannot accede to the argument that the next section which is taken from a subsequent Act controls its generality."

In *Re The Premier Trust Co. and Haxwell*, [1937] O.R. 497, in a case where there was the usual attornment clause contained in the mortgage, the judgment in appeal is given by Middleton J.A., in which he says in part:

"The mortgage is not executed by the mortgagee, but otherwise contains provisions by which the mortgagor attorns to and becomes the tenant of the mortgagee and agrees to pay the landlord rent equivalent to the interest stipulated for"

"The question raised is: 'Do the provisions of The Landlord and Tenant Act respecting summary jurisdiction which may be exercised over a tenant apply when the true and dominant relation of the parties is that of mortgagor and mortgagee?' It has

been the view of the Courts for many years that the provisions of The Landlord and Tenant Act have no application."

The case of *In re Reeve* (1867), 4 P.R. 27, is referred to by the learned Justice of Appeal, and he continues as follows: " . . . after consultation with some of his brother Judges Chief Justice Richards held that the Act did not apply to the case of a mortgagor in possession, and that the landlord mortgagee should be left to his remedy by ejectment or foreclosure. It does not appear in that case whether the mortgage, as here, contained appropriate provisions in any way creating the relationship of landlord and tenant; but the reason of this case still exists. The statute is appropriate when applied to a simple case of landlord and tenant, but inappropriate when it is sought to apply it to the case of mortgagor and mortgagee in that it deprives the mortgagor of the paternal care exercised by a Court of Equity over one of its favourite children—the mortgagor."

There is also cited in that judgment *Gordon v. Fraser* (1918), 43 O.L.R. 31, "in which it was held that in a mortgage containing provisions such as the mortgage here, the rights of the parties were to be governed by the law of fixtures as between mortgagor and mortgagee and not by the law of landlord and tenant, thus emphasizing the fact that the true relationship between the parties was that of mortgagor and mortgagee and not that of tenant and landlord."

I must therefore hold that the true relationship between the maker of the mortgage and the mortgagee is that of mortgagor and mortgagee and not of tenant and landlord, and that sec. 12 does not give to the mortgagee the right to distrain for interest or rent the goods and chattels of any person other than those of the mortgagor. The cases referred to seem to me to extend the wording of sec. 12 to mean that the right of the mortgagee, even with the attornment establishing the relationship of landlord and tenant, is limited to the right of the mortgagee to distrain upon the goods and chattels that belong to the mortgagor only.

The plaintiff, therefore, is entitled to succeed, and there will be judgment for the \$523 and for an order for payment out of court of that sum and any accrued interest to it. The plaintiff will recover its costs from the defendant.

The defendant appealed to the Court of Appeal from the judgment of Makins J.

March 17th, 1941. The appeal was heard by ROBERTSON C.J.O., FISHER and GILLANDERS JJ.A.

H. E. Fuller, K.C., for the defendant, appellant.

R. W. Gray, K.C., and *W. L. Millman*, for the plaintiff, respondent.

March 27th, 1941. ROBERTSON C.J.O.:—This is an appeal from the judgment of Makins J., dated 31st December, 1940, awarding the respondent, the plaintiff in the action, \$523 damages and costs.

The action arises from the seizure by appellant of certain goods and chattels upon which respondent holds a chattel mortgage. The goods and chattels in question were seized while upon the lands and in the possession of the maker of the chattel mortgage, and as its warrant for the seizure appellant relies upon a mortgage made by the same mortgagor upon his lands in favour of appellant. This mortgage contains an attornment clause, which is as follows:—

“And without prejudice to the mortgagee’s right to immediate possession of said lands on default, or to the right of subsequent mortgagees to take possession, the mortgagor doth attorn and become tenant at will thereof to the mortgagees from the date hereof at a rental equivalent to, payable on the days for payment of, and applicable when received in satisfaction of the interest hereby reserved, such tenancy being terminable without notice to quit in case of default. Provided the mortgagees may in the default of payment or breach of any of the covenants hereinbefore contained, enter on the said lands and determine the tenancy hereby created without notice.”

A statement of facts agreed upon by counsel was filed, and no witnesses were called at the trial. The validity of both mortgages is admitted, and it is admitted that there was interest in arrear on appellant’s mortgage at the time of seizure to an amount in excess of the value of any of the goods seized that were covered by respondent’s chattel mortgage.

Counsel for appellant argued at length in support of his claim that appellant’s mortgage established the relationship of landlord and tenant between mortgagee and mortgagor, and

no argument to the contrary was presented on behalf of respondent. It is not necessary, I think, to say anything on that point.

The substantial contest between the parties is with respect to the effect of sec. 12 of The Mortgages Act, R.S.O. 1937, ch. 155, which reads as follows:

"12. Notwithstanding any stipulation in the mortgage to the contrary, the right of a mortgagee to distrain for interest in arrear upon a mortgage shall be limited to the goods and chattels of the mortgagor, and to such of them as are not exempt from seizure under execution."

Appellant's mortgage, which is made under the Short Forms of Mortgages Act, contains the usual proviso that the mortgagee may distrain for arrears of interest. Appellant's contention is that sec. 12 of The Mortgages Act has relation only to the right of distress given by this provision, and does not in any way affect the right of the appellant to distrain as landlord under the attornment clause. The learned trial Judge decided against this contention, basing his judgment mainly upon the judgment of this Court in *Edmonds v. Hamilton Provident & Loan Society* (1891), 18 O.A.R. 347.

In my opinion we are bound by that judgment, as the trial Judge was. The judgment has stood for fifty years, and has not been overruled. So far as the Courts of this Province are concerned, I am aware of only one reported case where the decision in the *Edmonds* case would seem to be applicable but where it was not followed. That is *Kennedy v. Agricultural Development Board* (1926), 59 O.L.R. 374, a judgment of Rose J., now Chief Justice of the High Court. In that case the defendant, the holder of a charge on land under the Land Titles Act, had, by virtue of an attornment clause contained in the charge, distrained upon goods covered by chattel mortgage given by the owner to the plaintiff. The question considered in the judgment is whether the holder of a charge on land under the Land Titles Act can be landlord of the owner of the land, as the charge does not convey the legal estate to the chargee. The question of the application of sec. 12 of The Mortgages Act is not discussed, nor is the *Edmonds* case referred to, and I am informed by the learned Chief Justice of the High Court, who has been good enough to refer to his notes of the argument, that they contain no mention of the *Edmonds* case, nor of the section of the Mortgages Act now in question.

It is true that in some of the other Provinces the *Edmonds* case has been discussed, and in some Provinces it has been followed, and in others the opposite view has been taken of legislation similar in terms to sec. 12 of The Mortgages Act. Also it is to be observed that in some text-books of recognized standing in this Province the opinion of Burton J.A. in his dissenting judgment is preferred to the opinion of Osler J.A., concurred in by the other members of the Court. With all due respect to the opinion of those who have criticized the judgment of this Court in the *Edmonds* case, I think we should follow it, not only because it is the judgment of this Court and is of long standing, but because of the reasons upon which it is founded.

It would be presumption on my part to try to add anything of value to the reasons stated at length by so able and learned a Judge as the late Mr. Justice Osler, in support of the judgment in the *Edmonds* case, but in view of the fifty years that have since elapsed it may not be out of place to call attention to some relevant circumstances that were doubtless then fresh in the minds of the Judges who decided that case.

This section was first enacted in 1886 by 49 Vic., ch. 29, sec. 3, an Act entitled "An Act Respecting Landlords and Tenants and Distress." Section 1 dealt with a landlord's right of re-entry for non-payment of rent. Section 2 related to the matter of consent to assignment of a lease when the person whose consent is necessary is under disability. Section 3, the last section in the Act, was as follows:

"3. The right of a mortgagee to distrain for interest in arrear upon a mortgage, shall be limited to the goods and chattels of the mortgagor, and as to such goods and chattels, to such only as are not exempt from seizure under execution. This section shall not apply to existing mortgages."

It was well settled law when this Act was passed in 1886 that a right of distress given by a mortgagor to a mortgagee, without more, was a mere licence, and gave the mortgagee no right of distress against the goods of a third person. This had been stated to be the law in a number of cases decided not long before this enactment, and the law in that respect was not in dispute or doubt: see *Trust and Loan Co. v. Lawrason* (1881), 6 A.R. 286; 10 S.C.R. 680; *Laing v. Ontario Savings Co.* (1881), 46 U.C.R. 114; *Macdonell v. Building and Loan Association* (1885), 10 O.R. 580.

Now, if it was not intended by the enactment in question to change the then existing law, but merely to declare it, as is suggested by Burton J.A. in his dissenting judgment in the *Edmonds* case, why did the Legislature provide, as it did by the last sentence in sec. 3, that "this section shall not apply to existing mortgages?" The words are worse than meaningless in a statute declaring the existing law.

The Interpretation Act in force in 1886 provided, as does the Interpretation Act now provide, that "every Act and every provision or enactment thereof shall be deemed remedial" (R.S.O. 1877, ch. 1, sec. 8(38)). What it was thought required to be remedied when this enactment was passed appears in a judgment delivered within three months prior to its passing.

In *Macdonell v. Building and Loan Association* (*supra*), decided in the Common Pleas Division on 19th December, 1885, Cameron C.J., while upholding the right of the mortgagee as landlord to distrain upon the goods of the mortgagor's son on the premises, stated his adherence to views he had expressed in the case of *Trust and Loan Co. v. Lawrason* (*supra*) as to the propriety of allowing such an arrangement as permitted the claim of the mortgagee as landlord to prevail against strangers or creditors. The views he had so expressed are reported in 45 U.C.R., pp. 186-187. We have, therefore, the Chief Justice of the Common Pleas Division, almost immediately before the enacting of the legislation in question, calling attention to an existing state of the law that he thought should be remedied.

It may be further of some significance that in the *Macdonell* case, although there was a good attornment clause, the distress was made for the amount of "interest" due. It was evidently not regarded as of any moment that it was called "interest" and not "rent". In substance they were the same thing, and so the Legislature may have regarded it.

The only other matter to which I think I should refer is an argument based by appellant on sec. 13 of The Mortgages Act. Reliance was placed on the fact that in that section immediately following the section under consideration, a limitation is placed upon the right to distrain "for arrears of interest or for rent", as indicating that the Legislature added the word "rent" when it meant to include both rent and interest. I think the argument loses its force when it is observed that not only were the provisions that are now to be found in secs. 12 and 13 respectively,

not enacted at the same time—one being in 1886 and the other in 1887 (50 Vic., ch. 7, sec. 36), but when enacted they were not made to be read in sequence, nor even as sections of the one statute, but were quite independent pieces of legislation. Neither do they protect the same persons. I am unable to find any real substance in the argument, although when presented it may have seemed to have weight.

I am of opinion that the law to be applied in this case is the law as laid down in the *Edmonds* case, and that the learned trial Judge was right in following it.

The appeal should be dismissed with costs.

FISHER J.A.:—I fully agree with the reasoning and conclusion of my Lord the Chief Justice and my brother Gillanders and have nothing to add.

GILLANDERS J.A.:—An appeal by the defendant from a judgment of Mr. Justice Makins.

The facts are not in dispute; they were agreed upon by counsel and are set out in the reasons of the learned trial Judge.

The issue is whether the relationship of landlord and tenant existed between the defendant and one Mills, by virtue of the attornment clause in the mortgage executed by Mills to the defendant, so as to justify the seizure of chattels made by the defendant as “rent”; and secondly, the effect (if any) of sec. 12 of The Mortgages Act on the rights of the parties.

The appeal was ably argued by counsel for both parties.

On consideration, I am in agreement with the conclusion of the learned trial Judge that sec. 12 of The Mortgages Act has been authoritatively held to limit the right of distress “in every case in which the mortgagee whether in the character of a landlord or licensee, but still under and for the purposes of the mortgage had the right to distrain.” (See *Edmonds v. The Hamilton Provident and Loan Society* (1891), 18 O.A.R. 347.)

This case is decisive on the question involved in this appeal. It is true that some text-writers (see Falconbridge on Mortgages, 2nd ed., p. 698, and Williams on Landlord and Tenant, p. 237) have expressed the view respecting the *Edmonds* case that the dissenting judgment of Burton J.A. is the more reasonable and the correct view, and it is true that in other provinces in some cases the Courts have adopted the construction expressed

by Burton J.A. (see *Linstead v. Hamilton Provident and Loan Society* (1896), 11 M.R. 199; *McDermott v. Fraser* (1915), 23 D.L.R. 430; and *Hartman v. Gallagher*, [1938] 4 D.L.R. 104). However, in this province the judgment has stood for nearly fifty years. One of the points decided in that case was the very point here in question. The section there under consideration (R.S.O. 1887, ch. 102, sec. 16), read as follows:

“The right of a mortgagee to distrain for interest in arrear upon a mortgage, shall be limited to the goods and chattels of the mortgagor, and as to such goods and chattels, to such only as are not exempt from seizure under execution. This section shall not apply to mortgages existing on the 25th day of March, 1886.”

The section in question here (R.S.O. 1937, ch. 155, sec. 12) reads as follows:

“Notwithstanding any stipulation in the mortgage to the contrary, the right of a mortgagee to distrain for interest in arrear upon a mortgage shall be limited to the goods and chattels of the mortgagor, and to such of them as are not exempt from seizure under execution.”

The right of the mortgagee “to distrain for interest” is limited to the same goods, and this limitation is made more specific by the words in the present section, “notwithstanding any stipulation in the mortgage to the contrary.”

Counsel for the appellant urges that the section refers only to distraining for “interest” and does not cover “rent”; that if the Legislature intended it to apply to rent under an attornment clause, it would have been so expressed, and that this submission is supported by the fact that the following section (sec. 13) specifically covers distraint “for arrears of interest or for rent.” The situation was the same under the 1887 statute where sec. 17 similarly provided for both “arrears of interest or for rent”, and this was considered by the Court in the *Edmonds* case. Osler J.A. (at p. 358) expresses his views as follows:

“Whatever may be thought of the soundness of that decision” (referring to *Trust & Loan Co. v. Lawrason*, 10 S.C.R. 679), “the 16th section of R.S.O. (1887), ch. 102, now expressly enacts that the right of the mortgagee to distrain for interest in arrear, shall be limited to the goods and chattels of the mortgagor. This section has also, I think, the effect of limiting in the same

way any right of distress which the mortgagees might otherwise have had under another clause in the mortgage by which the mortgagors 'attorn to and become tenants at will to the mortgagees, at a rental equal in amount to the interest reserved payable at the time mentioned in the proviso.' The section is a general one, taken from sec. 3 of 49 Vict., ch. 29, 'An Act respecting Landlords and Tenants and Distresses.' Had it been intended to deal only with the mortgagee's right to distrain under a mere license, the enactment would have been unnecessary. I think the intention was to reach every case in which the mortgagee, whether in the character of landlord or licensee, but still under and for the purposes of the mortgage, had the right to distrain. The section is wide enough to cover every case, and I cannot accede to the argument that the next section which is taken from a subsequent Act, controls its generality. See now the Landlords and Tenants Act, R.S.O. (1887), ch. 143, secs. 27-28."

In the case at bar whether it be said that the distress in question was made *qua* mortgagee or *qua* landlord, it was made "under and for the purposes of the mortgage." Whatever view one might have if the point were still at large, effect must be given here to the judgment in the *Edmonds* case.

In view of this conclusion that any right of distress which the defendant may have had was limited by the statute to the goods of the mortgagor, and would not include those goods, the ownership of which was vested in the plaintiff by the chattel mortgage, it is unnecessary to pass upon whether or not the relationship of landlord and tenant was in fact created between the defendant company and Mills, in this case. The relationship may be created; as to whether it is or not is a question of fact: *Hobbs v. The Ontario Loan and Debenture Co.* (1890), 18 S.C.R. 483. I express no opinion on this point here.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

[GREENE J.]

Re Landry and Steinhoff.

Conflict of Laws—Wills—Mortgages—Mortgage on Ontario lands owned by deceased who died domiciled in Louisiana—Holograph will—Probate of will granted by Louisiana courts—Whether executrix can convey under power of sale contained in mortgage—The Devolution of Estates Act, R.S.O. 1937, ch. 163, sec. 7.

A mortgage of land situate in Ontario is for the purposes of testamentary disposition immovable property, and such a mortgage can only be effectively disposed of by a mortgagee domiciled at the date of death outside of Ontario and who is not a British subject by a will executed in accordance with the law of Ontario.

A MOTION by Stella Landry, executrix of a will of Loutie Landry Rees, deceased, for an order under The Vendors and Purchasers Act that certain requisitions on title had been validly answered.

The motion was heard by GREENE J. in Weekly Court at Toronto.

Peter White, Jr., for Stella Landry, the vendor.

C. D. Stewart, for Cora L. Steinhoff, the purchaser.

January 27th, 1941. GREENE J.:—This is an application under The Vendors and Purchasers Act arising from the following facts. One Loutie Landry Rees died domiciled in the State of Louisiana, one of the United States of America. By her will she devised her whole estate to her sister Stella Landry. The will was made in holograph form valid according to the laws of the State of Louisiana but not executed in accordance with the requirements of The Wills Act of the Province of Ontario. The will was duly admitted to probate in the State of Louisiana and ancillary letters probate as to personal estate only were granted out of the Surrogate Court of the County of Simcoe in the Province of Ontario. The only estate of any kind whatsoever that the testatrix had in the Province of Ontario was a mortgage on the lands covered by the agreement of sale from which the present application arises.

After obtaining such ancillary letters probate the executrix took proceedings under the mortgage in question and obtained a final order of foreclosure, a certificate of which was duly registered in the Registry Office for the County of Simcoe. The vendor now tenders a deed in which she, the grantor, is described as "Stella Landry of the City of New Orleans in the

State of Louisiana, one of the United States of America, spinster, the executrix of the estate of Loutie Landry Rees."

The purchaser made requisitions of title of which the one under discussion is as follows:

"Required evidence that the will of the late Loutie L. Rees is a valid will so far as the Province of Ontario is concerned respecting real estate; for ancillary letters probate of the personal estate only of the late Loutie L. Rees has been granted to Stella Landry and the will is a holograph will only."

The general rule is that the succession to personal property of a deceased person is governed by the law of the domicile of the deceased, and also that the validity or invalidity of a will in so far as it disposes of personal property is to be determined by the law of the country in which the testator was domiciled at the time of his decease. (See Can. Enc. Digest, Ontario Edn., vol. 2, p. 701).

It was common ground on the argument that a holograph will is valid according to the laws of the State of Louisiana and the grant of probate by the Courts of Louisiana also indicates such to be the fact.

The general rule, however, does not apply in the case of chattels real, or *immobilia*. *Freke v. Carberry* (1873), L.R. 16 Eq. 461, decided that "the validity of a testamentary disposition of an English leasehold is governed by the law of England, and not by the law of the testator's domicile."

In discussing that judgment Vaughan Williams L.J. said in *Pepin v. Bruyere*, [1902] 1 Ch. 24, at p. 26:

"The whole basis of the judgment of Lord Selborne is this—that, although a leasehold interest is a chattel interest, yet for the purposes of testamentary disposition a chattel interest in land, such as a leasehold interest is, must be treated as immovable property and must follow the law of the place where the land is situate."

Counsel for the vendor relied strongly on *Re St. Amand* (1918-19), 15 O.W.N. 165, where it was determined that a mortgage is personal estate, but the question did not arise there between movables and immovables. A mortgage on land is an immovable and its devolution is governed by the *lex loci rei sitae*.

See Halsbury's Laws of England, 2nd ed., vol. 23, p. 352, and *Re Burke*, [1928] 1 D.L.R. 318.

From the above it follows, in my opinion, that the will of Loutie Landry Rees was incapable of passing ownership to Stella Landry of the mortgage under which it is claimed she acquired title to the lands which she is attempting to sell.

Mr. White for the vendor further submits that, even if the will of the testatrix was not valid to pass title to the mortgage in Ontario, under sec. 7 of The Devolution of Estates Act, R.S.O. 1937, ch. 163, the mortgage would vest in the executrix, to whom ancillary letters probate were granted. The pertinent words of sec. 7 are as follows:

"Where an estate or interest or inheritance in real property is vested . . . by way of mortgage in any person solely, the same shall on his death, notwithstanding any testamentary disposition, devolve to and become vested in his executor or administrator in like manner as if the same were personal estate vesting in him"

No authority was cited to me as to the scope of this section, nor do I know of any decision on the section dealing with a situation similar to the present one. I would hesitate, however, to hold that the section could apply to an executrix appointed by a will not affecting any estate in Ontario and further not capable of affecting a mortgage of Ontario real estate. The only estate that the testatrix had in Ontario was the mortgage mentioned, and, if my opinion expressed above is correct, there was no Ontario estate passing under the will, and consequently no estate of any kind as to which administration could be validly granted in Ontario by virtue of such will to the executrix named by the will.

It may be noted that in *Pepin v. Bruyere* (*supra*) the Court held that an interest in leasehold property in England did not pass under the will of a domiciled foreigner executed according to the law of his domicile but not attested as required by the Wills Act in force in England, notwithstanding that letters of administration with the will annexed had been granted by the Probate Division.

As an alternative, the vendors offered a conveyance from the heirs-at-law of the testatrix under the power of sale contained in the mortgage, taking the position that if the foreclosure proceedings are invalid then the mortgage must still be a subsisting instrument. The mortgage contains a clause that all rights and powers secured to the mortgagee "shall be equally secured to and exercisable by his, her or their heirs, executors,

administrators and assigns, or successors and assigns, as the case may be." In addition thereto the vendor offers the original conveyance tendered, whereby the executrix would convey whatever rights (if any) that she might have.

I know of no statutory provision which would make the mortgage vest in the heirs-at-law three years after the death of the owner, as in the case of real estate, but, on the contrary, the section already partly quoted, namely, sec. 7 of The Devolution of Estates Act, provides that a mortgage shall devolve to and become vested in the personal representative, and, to quote the last of the said section, "for the purposes of this section the executor or administrator of the deceased shall be deemed in law his heirs and assigns within the meaning of all trusts and powers." In my opinion it is very doubtful if the heirs-at-law under an intestacy come within the meaning of the word "heirs" as used in the partially quoted clause from the mortgage. Section 7 of The Devolution of Estates Act indicates that the personal representative might come within the meaning of that word as used in the mortgage. As the will is inoperative to appoint an executrix within Ontario, it would appear that the only person who could act under the power of sale in the mortgage would be an administrator properly appointed in Ontario.

For these reasons it seems to me that the alternative tender is not an answer to the requisition.

The third answer advanced to the requisition was that it had not been made within the time allowed by the agreement of sale. The agreement provides as follows:

"The purchaser to be allowed to Oct. 28 to investigate the title . . . and if within that time she shall furnish the vendor with any valid objection to the title . . . this agreement shall be null and void. . . . Time shall be the essence of this agreement."

It is quite true that the formal letter setting out in detail the requisitions was not dated until October 28th, the last day of the period allowed, so that it did not reach the vendor's solicitors until October 29th. In my opinion it is not necessary to decide whether mailing the letter of October 28th on that day was in fact within the time allowed or not, as a previous letter of October 24th set forth in substance the requisition dealt with on this application.

The motion is dismissed with costs.

Motion dismissed with costs.

[ROACH J.]

Re Wagstaff.

Succession Duties—Property passing on death—Lien of Crown—Insolvent estate—Whether Crown's claim for succession duty should be paid in priority to claims of creditors of deceased, or pari passu with such claims, or after such claims—The Succession Duty Act, R.S.O. 1927, ch. 26, secs. 8, 12 and 19.

The claims of creditors of a deceased person have priority over the the claim of the Crown in the right of the Province for succession duty under the provisions of The Succession Duty Act, R.S.O. 1927, ch. 26.

By sec. 8(1) of the Act, succession duty is imposed on property passing on the death of any person. Under sec. 12 the only person liable for the payment of duty is the legatee, and the legatee's liability is limited to the duty on so much of the property as passes to him. Hence, notwithstanding the solvency of the estate of a deceased person at the date of death, if during the course of administration the estate becomes insolvent and the whole property of the estate is required to satisfy the creditors, then nothing passes to the beneficiaries or legatees and nothing remains to which a lien for succession duties could attach.

JUDGMENT for the administration by the Court of the estate of Albert Henry Wagstaff having been granted, the Crown, in the right of the Province of Ontario, asserted a claim for succession duty and contended that it should rank for its claim in priority to creditors of the deceased or, at least, *pari passu* with creditors.

The claim was heard by O. E. LENNOX, ESQ., Assistant Master, in Chambers at Toronto.

J. D. O'Brien, K.C., for the Succession Duty Department.

W. Judson, for The Royal Bank of Canada, a creditor.

G. D. Watson, for the executors.

F. W. Cawthorne, for Vera Sparks, a beneficiary.

O. E. LENNOX, ESQ., in a written judgment, said that the late A. H. Wagstaff died on the 19th of April, 1931. Judgment for administration of the estate by the Court was granted upon the application of the executors on the 4th day of December, 1934. It is conceded that the estate will likely prove to be insolvent. The Succession Duty Department in the right of the Crown, whose claim as originally computed amounted to \$17,-834.24 and now with interest amounts to \$25,395.46, claims in event of insolvency to rank at least as an ordinary creditor in the ultimate distribution, if not as a secured or preferred creditor.

The present case is governed by the provisions of The Succession Duty Act as revised by R.S.O. 1927, ch. 26.

The main points raised in opposition to the claim are:

1. That the tax in question is, as the name of the Act implies, a tax on a succession, and the term "property passing on the death of any person", as used in sec. 8 and throughout the Statute means an actual passing into the possession of those beneficially entitled, and not a theoretical or fictional passing.

2. That to allow the claim would amount to indirect taxation.

3. That if the Crown is held to be a creditor there must be a debtor, and there is clearly no debtor, once those beneficially entitled are eliminated.

The answer to all of these questions in turn largely depends on the one question, whether the tax imposed by the Statute is solely on a succession or whether there is an ancillary or alternative form of taxation directed against property. Judicial decisions of weight are not lacking regarding the dual purpose of similar legislation. The Judicial Committee of the Privy Council held that the New Brunswick Statute in imposing a duty upon all property situate within the province, whether the deceased was domiciled there or not, assimilated the tax to a probate duty: *Lovitt v. The King*, [1912] A.C. 212. It is not necessary to compare the Ontario Act with that of New Brunswick, as a like opinion was expressed by the Court of Appeal in *Erie Beach Co. Ltd. v. Attorney-General* (1929), 63 O.L.R. 469. At p. 481, Hodgins J.A. says: "The duty therefore, which judging by the title of the Act may be denominated 'Succession Duty' is of two kinds. One is succession duty in the proper sense of that term, and the other approximates to an estate or probate duty".

In England there are two separate forms of tax exacted, estate duty (superseding and enlarging upon the former probate duty) and succession duty in the true sense of the word. The Province of Ontario seeks to exact only one tax, but appears to provide two methods or alternatives in exacting this tax. Duff J., as he then was, deals with this aspect of certain provincial legislation as follows: "Toll may be exacted as an incident of the accrual of the benefit or as a condition of the passing of the title. And since either is valid when acted upon to the exclusion of the other, I do not see upon what ground it can be said that both principles may not be brought, so to speak, under the same roof and combined in a single system. The decision

of the Judicial Committee in *Lovitt v. The King*, appears to support this view": *The King v. Cotton* (1912), 1 D.L.R. 398, at p. 425. The Statute under consideration has combined these two methods of taxation, although only seeking to levy one tax, and if such is the case, the tax is directed against the property of the decedent, attaches at the moment of his death, is direct, as being levied against property; and moreover, no question of debtor and creditor arises as it is a lien or charge upon property, independent of any primary liability.

The only contrary opinion is that expressed by Robson J.A. of the Manitoba Court of Appeal in *Re Bennett, Provincial Treasurer v. Bennett*, [1936] 2 D.L.R. 291, at p. 297: "I think the lien is merely an adjunct or accessory to the tax and that the tax must be exigible against ascertained persons". Much as the practical fairness of this conclusion commends itself, it must be taken as *obiter* as the other members of the Court did not deal with this phase of the question and it was not considered in the appeal to the Supreme Court of Canada, [1937] S.C.R. 138, where the judgment rested solely on the determination that a bank deposit receipt was a specialty debt and being negotiable on its face, its *situs* was at the place where found on the owner's death.

It is therefore open to the Province to assimilate these two types of duty in one act, and the opinion is expressed in the *Erie Beach* case (*supra*) that in Ontario this is an accomplished fact. It should be noted that sec. 9 refers both to a levy "in respect of any succession, or on property passing on the death, according to the dutiable value". If these two forms of levies are combined in Ontario, little further need be said, as the argument based on the meaning of the phrase "passing on the death of any person" necessarily assumes that only one form of duty is contemplated, namely a duty on a succession or strictly speaking a transmission.

That the term means passing at the moment of death appears to be the only meaning that can be fully reconciled with the other provisions in the Act, notably the important sec. 16, wherein is provided that the duty so payable shall be and remain a lien upon the property in respect of which it is payable. The reasoning of Hodgins J.A. in *Attorney-General for Ontario v. Baby* (1926), 60 O.L.R. 1, at p. 6, is of assistance, in distinguishing the term "transmission" as used in the Quebec Act from

the word "succession" as used in the Ontario Act, the latter being the accrual of a right to benefit as opposed to the completed transaction, which of course, follows the same trend of thought as the observations of the present Chief Justice of Canada in the *Cotton* case. Any remarks in the *Baby* case in respect of estate duty, which would appear to question that this form of taxation is to be found in the Ontario Act, are later explained by the same learned Judge in the *Erie Beach* case.

In England there are two separate duties or taxes which may be levied, estate duty and succession duty, and these are provided for by separate legislation. The term "passing on death" is to be found in sec. 1 of The Finance Act of 1894, 57 and 58 Vict., ch. 30, dealing with estate duty, and is not to be found in the Imperial Succession Duty Act. In *Winans v. Attorney-General*, [1910] A.C. 27, at p. 31, Lord Loreburn in considering sec. 1 of the Finance Act says: "The property in them (Consols) undoubtedly passed out of the deceased at the time of his death". The two types of duty are also distinguished in this decision. "Legacy and succession duties fall upon the benefits received by survivors. Estate duty falls upon the property passing upon a death apart from its destination".

So in considering the basic question here as to whether two forms of taxation are combined in one statute, in order to obtain a judicial opinion of the effect of the very phraseology on which those opposing the present claim mainly rely, recourse must be had to decisions under an Imperial Statute, in respect of the type of duty or levy said to be excluded from the provincial statute.

The question of indirect taxation and that the debtor fails for the lack of a creditor are also determined by the fact that the tax is levied against property. Moreover, the first objection is directed to the result rather than the mode of the taxation, which is not a proper test, and is erroneous in as much as, although the creditors are substantially affected, they are not in fact called upon to pay the tax.

The learned Assistant Master said that he had therefore reached the conclusion that the Crown has a lien upon the property of which the deceased died possessed, but that the claim is relegated to the position of that of an ordinary creditor under the provisions of sec. 48 of The Trustee Act, R.S.O. 1937, ch. 165, and accordingly the question of interest is governed by Con-

solidated Rule 435, and as such is subject to the priority given to certain costs, expenses and charges, according to well established principles, in relation to the realization and distribution of estates of deceased persons.

The Royal Bank of Canada appealed from the report of the Assistant Master and the Treasurer of Ontario cross-appealed therefrom.

The appeal and cross-appeal were heard by ROACH J. in Weekly Court at Toronto.

W. Judson, for The Royal Bank of Canada, appellant.

C. R. Magone, K.C., and *J. D. O'Brien*, K.C., for the Treasurer of Ontario, respondent.

G. D. Watson, for the executors.

H. R. Gray, for Vera Sparks, a beneficiary.

February 18th, 1941. ROACH J.:—This is an appeal by the Royal Bank of Canada, a creditor of the estate, and a cross-appeal by the Treasurer of the Province from a report of the Assistant Master, described as Interim Report No. 4 dated the 29th day of October, 1940.

There are no facts in dispute and this appeal is confined solely to questions of law.

The deceased died testate on the 19th day of April, 1931. The Trusts and Guarantee Company Limited and Albert Henry Wagstaff are the executors and trustees of the estate. Judgment for the administration by the Court was granted upon the application of the executors on the 4th day of December, 1934.

Following the deceased's death succession duties claimed by the Province of Ontario were computed and found to amount to \$17,834.24. They have not been paid. The great bulk of the estate consists of real property and, due, I assume, to shrinkage in values in the interim, the estate is now insolvent. The Assistant Master has reported as follows:—

General creditors' claims	\$ 50,596.21
Interest thereon	25,783.85
Succession duties	17,834.24
Interest thereon	7,561.22
<hr/>	
Total.....	\$101,775.52
Apparent realizable value of assets of estate.....	72,200.00

The Assistant Master held that the Treasurer of Ontario is entitled to a lien on the property of which the deceased died possessed for succession duties as above, but that by virtue of sec. 48 of The Trustee Act, R.S.O. 1927, ch. 165, the claim of the Treasurer is relegated to the position of an ordinary creditor and ranks *pari passu* with the claims of the general creditors.

The appellant contends,

(1) That the Treasurer of Ontario is not a creditor of the estate for succession duties.

(2) That the general creditors are entitled to be first paid before the Treasurer is entitled to payment of his claim.

(3) That the lien of the Treasurer can only be on the property in the hands of the executors after payment of the debts of the deceased.

By way of cross-appeal the Treasurer of the Province contends that succession duties and interest thereon take precedence over all other claims and are a first lien on the property passing on the death of the deceased.

The statutory provisions governing are those contained in The Succession Duty Act in effect at the date of the deceased's death. If this were not otherwise so it is declared to be so by sec. 47 of The Succession Duty Act, 1939, ch. 1. This then requires a consideration of The Succession Duty Act, R.S.O. 1927, ch. 26. There were no relevant amendments thereafter up to April 19, 1931.

Succession duties do not constitute a debt owing by the estate to the Province. This was conceded on the argument by counsel for the Treasurer of the Province. See *Re Reading*, [1940] O.W.N. and the cases there cited.

Since the duties are not a debt of the estate then sec. 48 of The Trustee Act which provides that all debts, including debts due to the Crown, shall, in case of a deficiency, rank *pari passu*, does not apply.

Then have succession duties priority over the claims of the creditors of the estate? It struck me as startling that it should be contended that they had but let us examine the Act which creates them.

Section 8(1) provides that "All property situate in Ontario and any income therefrom passing on the death of any person, . . . as well as all other property subject to succession duty upon

a succession shall be subject to duty at the rates hereinafter imposed."

It is therefore a tax imposed in respect of property. What property? It is not, as the Assistant Master held, property of which the deceased died possessed, but property "passing on the death" or property "subject to succession duty upon a succession".

Then who is liable for the payment of it?

By sec. 19 the executor or trustee is required to deduct the duty before transferring to a legatee, donee or other successor any property to which such person is entitled, failing which the executor or trustee is made personally liable for the . . . amount of such duty and penalties. In so doing the executor or trustee is deemed to be an officer for the collection thereof within the meaning of The Public Revenue Act.

Section 12 provides that "every heir, legatee, donee, or other successor and every person to whom property passes for any beneficial interest in possession or in expectancy shall be liable for the duty upon so much of the property as so passes to him."

Apart therefore from the limited or conditional liability for payment imposed on the executor or trustee by sec. 19 the only person liable for payment is the legatee, etc., under sec. 12, and his liability is limited to the duty on so much of the property as passes to him.

Now "passes" means "changes hands". See *Neville v. Inland Revenue Commissioners*, [1924] A.C. 385, at p. 389, and *Attorney-General v. Milne*, [1914] A.C. 765, at p. 779.

It is true that on the death of a person the title to property vested in him and with respect to which he has the power of disposal passes to and becomes vested in his personal representatives by virtue of The Devolution of Estates Act. That passing, however, is not the passing referred to in the Succession Duty Act. The personal representative is merely a trustee. He is the conduit through whom the title passes, or more accurately may pass, to the persons beneficially entitled. Moreover the same statute which vests the title in the personal representative makes that property liable for the payments of the debts of the deceased. Since that property would in the lifetime of the deceased be liable for the payment of his debts it is accurate to say that the statute preserves the rights of the creditors in that respect.

That being so, then, notwithstanding the solvency of the estate at the date of death, if during the course of administration the estate becomes insolvent and the whole property of the estate is required to satisfy the creditors of the estate then nothing passes to the beneficiaries or legatees. For the purposes of the Succession Duty Act, still regarding the personal representative as the conduit, it may be said that everything is drained out of that conduit on its way toward the beneficiaries or legatees and nothing ever reaches them.

The Succession Duty Act, in my opinion, clearly recognizes the priority of the claims of creditors against the assets of the estate. Section 4 provides that, "In determining the dutiable value of property or the value of a beneficial interest in property the fair market value shall be taken as at the date of the death of the deceased, and allowance shall be made for reasonable funeral expenses, debts and encumbrances and surrogate Court fees (not including solicitor's charges); and any debt or encumbrance for which an allowance is made shall be deducted from the value of the land or other property liable thereto"

Since the claims of creditors come first then if the whole estate is consumed in paying those claims nothing passes to the legatees or beneficiaries and nothing remains to which a lien for succession duties could attach.

Since writing the foregoing counsel for The Royal Bank of Canada has supplied me with the galley proofs of the judgment of the Court of Appeal of Nova Scotia in *Re Jost* which I understand is to be reported in [1941] 1 D.L.R. part 10. It would appear from that judgment that the relevant sections of the Succession Duty Act of Nova Scotia are the same as in the Ontario Act. It was there also held that property "passes" to a beneficiary only when it reaches him. That was a case in which values shrank to the point where the estimated residue on which succession duties were computed was actually extinguished. The executors had paid the duties computed on this estimated residue and because of the shrinkage in values those duties were charged by the executors to the estate. The Court held that the shares of other beneficiaries could not be cut down by the amount of succession duties computed on a residue which never came into existence. In that case the Court went further and held that, notwithstanding that in computing the tax the fair market value shall be taken as at the date of the death, the beneficiaries are

only liable for the duty on so much of the property as passes to them.

For the reasons which I have stated this appeal should be allowed and the cross-appeal dismissed, and the report of the Assistant Master varied accordingly.

The costs of the appealing creditor and of the executors should be taxed and payable out of the assets of the estate, those of the executors on a solicitor and client basis. No costs to the respondent or the beneficiary appearing on the motion.

Appeal of Royal Bank of Canada allowed; cross-appeal of Treasurer of Ontario dismissed.

[COURT OF APPEAL.]

**Tolton Manufacturing Co. Ltd. et al. v. The Advisory Committee
for the Men's and Boys' Clothing Industry for Ontario.**

Constitutional Law—Admissibility of evidence—Whether The Industrial Standards Act, R.S.O. 1937, ch. 191, is intra vires of the Legislature of Ontario.

The plaintiffs brought this action for a declaration that The Industrial Standards Act, R.S.O. 1937, ch. 191, is *ultra vires* of the Legislature of Ontario. At the trial Roach J. declined to admit certain evidence tendered by the plaintiffs for the purpose of showing the effect and operation of the Act. Roach J. was of the opinion that the Act was *intra vires* and he dismissed the action: [1940] O.R. 301.

Held, by the Court of Appeal that there should be a new trial at which all the evidence tendered by the plaintiffs should be accepted by the trial Judge subject to objection. The Act has not been the subject of prior judicial investigation and the parties will likely desire to take the opinion of the Supreme Court of Canada or of the Privy Council concerning the validity of the Act and it is desirable that all the evidence concerning the contentions of the plaintiffs be on the record.

AN appeal by the plaintiffs, other than Tolton Manufacturing Co. Ltd., from the judgment of Roach J., reported in [1940] O.R. 301, dismissing the action which had been brought for a declaration that The Industrial Standards Act, R.S.O. 1937, ch. 191, is *ultra vires* of the Legislature of Ontario. The plaintiff Tolton Manufacturing Co. Ltd. discontinued proceedings after the judgment of Roach J. was delivered.

The appeal was heard by MIDDLETON, MASTEN and FISHER JJ.A.

A. G. Slaght, K.C., and J. C. M. German, K.C., for the plaintiffs, other than Tolton Manufacturing Co. Ltd., appellants.

J. L. Cohen, K.C., for the defendants, respondents.

C. R. Magone, K.C., and J. C. Adams, K.C., for the Attorney-General for Ontario.

March 14th, 1941. The judgment of the Court was delivered by MIDDLETON J.A.:—An appeal from the judgment of the Honourable Mr. Justice Roach bearing date the 14th day of June, 1940, at the non-jury sittings at Toronto by which he dismissed the action with costs.

The action was brought by the Tolton Manufacturing Co. Limited, Ontario Boys' Wear Limited and Aaron Horovitz and Louis Horovitz, carrying on business as Cornwall Pants and Prince Clothing Company, and the said Cornwall Pants and Prince Clothing Company against The Advisory Committee appointed pursuant to the Industrial Standards Act for the purpose of obtaining a declaration that the Act, R.S.O. 1937, ch. 191, is not within the power of the Legislature of the Province of Ontario, and is *ultra vires* under the British North America Act; secondly, a declaration that secs. 7 and 15 of the said Act and the regulations made pursuant to the said Act are also *ultra vires*; thirdly, for a declaration that the schedule established pursuant to the Act for the men's and boys' clothing industry and approved by the Lieutenant-Governor in Council on the first of April, 1939, is *ultra vires*; and fourthly, for an injunction to restrain the defendant, its servants, employees, workmen and agents from collecting or attempting to collect from the plaintiffs any sums of money whatever alleged to be owing under the aforementioned schedule, and from enforcing or attempting to enforce the said schedule as against the plaintiffs, and for other relief and the costs of the action.

This statement of claim contains four paragraphs. The first defines the parties to the action. The second sets out that by an Order in Council there was established a schedule of wages and hours and days of labour for men's and boys' clothing industry following a conference of representatives of the said industry. The schedule purports to confer upon the defendant power to collect certain assessments of money from the plaintiffs and other manufacturers engaged in the said industry. The third paragraph sets out that the Industrial Standards Act is not within the enacting powers of the Legislature of the Province of Ontario, and is *ultra vires* the powers conferred upon the Legislature by the British North America Act. The plaintiffs specifically allege that

sec. 7 of the Act and the aforementioned schedule for men's and boys' clothing industry and the regulations made under sec. 13 are *ultra vires*. In the fourth paragraph it is alleged that the plaintiffs therefore refused to recognize the right of the defendant to enforce the said schedule against them. On or about the 4th of January, 1940, the Industry and Labour Board of the Province of Ontario gave to the defendant its authority and consent to certain proceedings being taken by the defendant pursuant to sec. 15(3) of the Act, and on the 5th and 6th days of January, 1940, respectively the defendant laid, or caused to be laid, a number of informations in the Police Courts in the Province against the plaintiffs, Ontario Boys' Wear Limited and Aaron Horovitz and Louis Horovitz which are now pending.

To this statement of claim the defendants filed a statement of defence in which they specifically admit paragraphs 1, 2 and 4 of the statement of claim and say with relation to paragraph 3 that the Act or the regulations thereunder, or the schedule of wages, hours and days of labour, pursuant to the said Act, are valid and binding as therein set forth, and constitute questions of law determinable in any proceeding in relation to the Industrial Standards Act or regulations or schedule which have been, or may be, instituted against the plaintiffs or any of them.

Issue being joined upon this statement of defence the action was entered for trial and came on for hearing before Mr. Justice Roach. The result of the hearing was his judgment now in appeal.

Upon this record the course pursued at the trial is indicated by the notes of the proceedings at the trial. Mr. Hellmuth, who there appeared as senior counsel for the plaintiffs explained the nature of the proceedings generally and filed certain exhibits which were admitted by the defendants. These consisted of the schedule to the Industrial Standards Act for the men's and boys' clothing industry in the Province of Ontario as defined by the Minister of Labour published in the Ontario Gazette; two notices also published in the Ontario Gazette; a booklet containing regulations pursuant to the Industrial Standards Act; four summonses against the Ontario Boys' Wear Limited issued by police magistrates each dated January 5th, 1940; sixteen summonses against Aaron Horovitz and the Prince Clothing Company and Cornwall Pants Company each dated January 6th, 1940; an authority from the Industry and Labour Board

dated January 4th, 1940, and certain correspondence between the various solicitors.

Mr. Hellmuth then stated that he proposed, as representing the plaintiffs, to call witnesses for the purpose of showing what the situation at that time was (notes of trial, p. 22). Argument followed, and Mr. Hellmuth's request was denied him and the learned Judge said that, beyond the admission volunteered by counsel for the defendant to the effect that the industry in question is one of an inter-provincial character, he would decline to admit the evidence tendered, and he proceeded, against Mr. Hellmuth's protest, to dispose of the action without allowing any evidence to be given.

An appeal was brought from the judgment by all the parties plaintiff, but pending the hearing of the appeal the Tolton Manufacturing Co. Limited filed a notice of discontinuance, wholly discontinuing the appeal so far as that particular plaintiff is concerned, and counsel has been changed, Mr. Slaght now appearing for the remaining plaintiffs.

Upon opening the matter and upon hearing Mr. Slaght it became apparent to the Court that much embarrassment was caused by this ruling. It also appeared that the plaintiffs were precluded from arguing matters that appeared to Mr. Slaght to be of prime importance, and that they could not be argued as the facts upon which the arguments were founded did not appear upon the notes. It also appeared to us that the whole record was in an unsatisfactory condition because Mr. Slaght's argument was not in any way founded upon facts appearing in evidence.

This litigation is of very great importance. So far as we are aware the Act has not been the subject of judicial investigation, and it may well be that the parties will desire to take the opinion of the Supreme Court or of the Privy Council concerning this Act. We therefore suggested, and understood our suggestion to be acquiesced in by counsel present, that we should direct:

(1) that the plaintiffs be at liberty to amend the statement of claim as they may be advised, particularly by pleading and establishing by way of evidence all such facts as counsel may advise and upon which counsel intends to found an argument that the provisions found in the Industrial Standards Act, R.S.O. ch. 191, or the schedule of wages, hours of labour, etc., or the regulations of the Advisory Committee appointed pursuant to

The Industrial Standards Act are invalid. These matters were detailed somewhat fully by Mr. Slaght, but it is our intention that he should set forth all that he may desire to complain of upon the argument, and that we should not in any way restrict him beyond requiring him to outline the facts relied upon fully. It is our intention that all these matters shall be particularized fully and fairly by the plaintiffs.

(2) that the case be retried at the Toronto non-jury sittings and that all evidence tendered by the plaintiffs should be accepted by the trial Judge subject to objection. We do not think that it is appropriate for the trial Judge to rule upon evidence before he receives it.

(3) all parties to the action undertake to expedite the re-hearing of this cause.

It would seem to us to be of importance that the case should be fully and fairly tried, leaving it to the Court to ultimately dispose of this action to pass upon evidence which is before the Court, rather than to attempt to adjudicate upon the question without having the evidence before it.

The costs of the proceedings heretofore and of the appeal should be in the discretion of the Court ultimately disposing of the action on the merits.

The Tolton Manufacturing Company is not before this Court in any way and this should so appear. The presence of this party in the style of cause may occasion trouble later on and the parties may possibly consent to its elimination.

Order accordingly.

[COURT OF APPEAL.]

Shaw v. Agnew.

Bills and notes—Alleged material alteration—Note expressed “to be held as collateral security for cheques given”—Condition—Whether document a promissory note—The Bills of Exchange Act, R.S.C. 1927, ch. 16, secs. 176 and 178.

The defendant executed a document on a promissory note form payable to the plaintiff and added the words “this note to be held as security for cheques given”.

Held, that the effect of this provision was to attach a condition by which the document was not payable absolutely and unconditionally but was limited to being collateral security for the payment of cheques which had been given by a third person to the plaintiff. Before the note was delivered to the plaintiff the words quoted above were stricken out without the authority of the defendant. Thus the defendant never in fact signed an unconditional promise to pay, or in other words never signed a document which on delivery could become a promissory note and never authorized or affirmed deletion of the condition which he asserted, and therefore the document could not be made into his note by another person without his authority or consent. Therefore the action on the document failed.

AN action upon a promissory note.

The action was tried by MACKAY J., without a jury, at Orangeville.

R. M. W. Chitty, K.C., and *H. B. Church*, K.C., for the plaintiff.

R. R. Evans, K.C., for the defendant.

January 11th, 1941. MACKAY J.:—This is an action on a promissory note dated November 2nd, 1938, for the sum of \$1,000 payable to the order of the plaintiff and made by N. Koella and the defendant, W. George Agnew. Briefly the facts are as follows:

Koella was indebted to the plaintiff in an amount of approximately \$1,300. Koella from time to time issued cheques to the plaintiff aggregating \$1,212.44, which cheques were returned by the bank to the plaintiff, there being insufficient funds to meet them. The plaintiff pressed Koella for security and Koella gave the promissory note upon which the plaintiff brings this action. The face of the promissory note, Exhibit 1 in this action, reads as follows:

“ Due Nov. 6

\$1,000.00

Nov. 2, 1938

1 year—————after date I promise to pay to the order of William Shaw

The Sum of one Thousand—————100 Dollars
at _____

Value received

~~_____~~

~~_____~~ N.K.

6 per cent.

~~_____~~

N.K.

N. Koella

No.

W. Geo. Agnew"

The defendant admits his signature and that he executed the note. It appears from the evidence that Koella asked the defendant to go to his house on November 2nd, 1938; after the defendant reached the home of Koella and in Koella's presence the defendant filled in the promissory note, Exhibit 1, using a fountain pen given him by Koella. The defendant says he signed his name and then Koella signed his name. The defendant says that when he handed the note to Koella the words he had written on the note: "This note to be held as security for cheques given," were not stricken out as it now appears, and that the words "6 per cent." now appearing on the note were not on the note, nor did the initials N.K. appear in more than one instance if at all.

The plaintiff says that when he received the note, it being handed to him by Koella, it was in the identical plight in which it appears to-day, disregarding, of course, the markings of the bank and also the words "November 6th" written in lead pencil on the face of the note. The irresistible conclusion of fact is that the words "6 per cent." and at least one of the twice appearing initials "N.K." were written on the note some time between the time when the defendant Agnew handed the promissory note to Koella and when Koella handed it to the plaintiff.

The defendant resists payment of the note on the following grounds: (a) his signature was procured by fraud and misrepresentation; (b) the document was materially altered after his signing the name and without his knowledge or consent; (c) the document is not an unconditional promise in writing and is not a promissory note or a negotiable instrument; (d) the plaintiff took said document when it was not complete or regular on the face of it and with knowledge of the defects and circumstances and subject to all equities; (e) of lack of any consideration.

I am of opinion that the evidence does not establish defences (a), (c) (d) and (e) as having any merit whatsoever, and these defences are hereby rejected.

It is argued by counsel for the defence that striking out the words "This note to be held as security for cheques given" is a material alteration. I am of opinion that this contention is not maintainable in law; that these words mean collateral security and collateral does not mean additional or secondary, it means "parallel" security. See The Bills of Exchange Act, sec. 176, subsec. (3), and also *Early v. Early* (1878), 16 Ch. D. at p. 214; *Lecomte v. O'Grady* (1918), 57 S.C.R. 563.

It may very well be that the words "6 per cent." written on the note after the note was handed by the defendant Agnew to Koella constitute a material alteration and as such vitiate the promissory note. I do not think that the contention of Mr. Chitty that these words are meaningless should prevail. I cannot arrive at any conclusion other than that the words "6 per cent." mean that the note is to bear interest at the rate of six per cent. Mr. Chitty relied on the case of *Dechene v. Bertrand* (1931), 52 Que. R. (K.B.) 258. In that case the words "8 per cent." were written on a note without erasure of the rate of interest 7 per cent. indicated in words and figures on the note. The Court held that this was not a material alteration; the reason given was that this alteration did not in any way affect the operation of the note.

The first part of sec. 145 of the Bills of Exchange Act is as follows:

"Where a bill or acceptance is materially altered without the assent of all parties liable on the bill, the bill is void except as against the party who has himself made, authorized or assented to the alteration and subsequent indorsers."

In the case at bar I am of opinion that the words "6 per cent." written on the face of the note do change the operation of the note and constitute therefore a material alteration: *Black v. Collin* (1917), 28 Man. 665; *Warrington v. Early* (1853), 2 El. & Bl. 763; *Bank of British North America v. Robertson* (1917), 28 Man. 54; *Hebert v. La Banque Nationale* (1908), 40 S.C.R. 458, and *Davidson v. Cooper* (1843), 11 M. & W. 779, Lord Abinger C.B., at p. 799.

The action should therefore be dismissed, but under the circumstances without costs.

The plaintiff appealed to the Court of Appeal from the judgment of Mackay J. dismissing the action.

March 11th, 1941. The appeal was heard by ROBERTSON C.J.O., HENDERSON and GILLANDERS JJ.A.

R. M. W. Chitty, K.C., and *H. B. Church*, K.C., for the plaintiff, appellant.

R. R. Evans, K.C., for the defendant, respondent.

March 27th, 1941. The judgment of the Court was delivered by GILLANDERS J.A.:—The plaintiff appeals from a judgment of Mr. Justice Mackay whereby the plaintiff's action, brought against the defendant on a promissory note, was dismissed without costs. The facts are not in dispute.

N. Koella, for whose accommodation the alleged note was given, was indebted to the plaintiff, who is a merchant. Koella had issued a number of cheques payable to the plaintiff totalling some \$1,212.44 on this indebtedness of approximately \$1,300. These cheques were dishonoured by the bank, and the plaintiff asked Koella for security, whereupon Koella obtained from the defendant for his accommodation the document in question. This document is on a promissory note form and was written out by the defendant in Koella's presence. The defendant in his own handwriting wrote on the document the words "this note to be held as security for cheques given." This was handed to Koella who is since deceased. When the document was delivered to the plaintiff the words indicated were stricken out with the initials N.K. placed beside them, and in the lower left hand corner had been written the words "six per cent."

The plaintiff brought action on the alleged note and this was dismissed by the learned trial Judge who held that, while the striking out of the words "this note to be held as security for cheques given" did not in his opinion constitute a material alteration, the addition of the words "six per cent." written after did constitute a material alteration to a note, and that by virtue of sec. 145 of The Bills of Exchange Act the note was thereby voided as against the defendant who had not made, authorized or assented to this alteration. From this judgment the plaintiff appeals and submits that he holds a promissory note; that there was no material alteration of the note sued upon because (a) neither of the alterations alleged to have been made after it was signed by the defendant is material, and

(b) that they were in any event not alterations to a note because until delivery the document is inchoate and incomplete by virtue of the provisions of sec. 178 of The Bills of Exchange Act.

I am of opinion that the document signed by the defendant was not a promissory note nor in the form signed by him could it have become a promissory note by virtue of delivery. The defendant himself inserted the provision "This note to be held as security for cheques given." The effect of this provision was, I think, to attach a condition by which it was not payable absolutely and unconditionally, but was limited to being collateral security for the payment of the cheques given to the plaintiff. The effect of similar words has been considered in other cases.

Hall v. Merrick (1877), 40 U.C.Q.B. 566, was decided prior to the present Bills of Exchange Act, but on the question under consideration is still in point. The document there in question, otherwise in the form of a promissory note, included the words, "This note to be held as collateral security." It was held that the instrument was not a promissory note, not being for the payment of money absolutely. See also *Sutherland v. Patterson* (1884), 4 O.R. 565, where the document included the words, "This note is given as collateral security for a guarantee of \$5,000 given to John Sutherland by Alexander Sutherland." Chief Justice Wilson in his judgment said in part:

"The document filled up by the plaintiff in the form of a promissory note is not recoverable as a note, because it reads as a contract by which the money is not payable absolutely and at all events, but is only a collateral security for a guarantee given by the defendant to the plaintiff." By sec. 176 of The Bills of Exchange Act a promissory note must be "unconditional." The document here in question was not unconditional.

As stated, before the alleged note was delivered to the plaintiff this condition inserted by the defendant had been stricken out, and the words "six per cent." had been written on the document. Notwithstanding these alterations, made before delivery, does the plaintiff now hold a promissory note on which the defendant is liable? It may be, as urged by counsel for the appellant, that the addition of the words "six per cent." does not constitute a material alteration in that they do not amount to an engagement to pay interest and do not affect

the operation of the note. We are referred to a case in Quebec of *Dechene v. Bertrand* (1931), 52 Que. R. (K.B.) 258, as supporting this contention. In my view it is unnecessary to pass upon that point here. If I am correct in my opinion that the defendant never in fact signed an unconditional promise to pay, or, in other words, never signed a document which, on delivery, could become a promissory note and never authorized or affirmed deletion of the condition which he inserted, I think that the document cannot, under the circumstances here, be made into his note by another person without his authority or consent.

In the case of *Gill et al. v. Doey et al.*, [1934] O.R. 406, the majority of the Court, with Riddell J.A. dissenting, held that an accommodation maker of a promissory note was liable at the suit of the payee's executors, although the note had been altered by the principal maker at the suggestion of the payee's wife by adding her name as an additional payee, but without the knowledge or consent of the payee, who was at the time very ill. In that case, however, it should be noted that the defendant had executed a valid promissory note, and that the only question arising was that respecting the alteration of the note after delivery while in the hands of the payee, but without his knowledge or consent.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

[COURT OF APPEAL.]

McFadyen et al. v. Harvie et al.

Physicians and surgeons—Operations—Negligence—Liability of chief surgeon at an operation for the negligence of his assistants—Res ipsa loquitur.

It can not be said wholly as a matter of law that at every operation upon a patient the chief surgeon in charge of the operation is responsible for whatever may occur there or even that in every case he is liable for negligence on the part of an assistant. Something may depend upon the character of the operation and there may be established rules and customs among surgeons that must be taken into account. The Court has no knowledge of operating room procedure or practices nor can it say, without evidence, when an assistant is reasonably required nor for what purposes he may be used. So long as the presence and participation of an assistant are proper, and the assistant is a duly qualified surgeon with the skill and experience necessary for the work properly entrusted to him, purely as a matter of law and without evidence the Court can not find the chief surgeon responsible for the negligence of his assistant.

AN appeal by the plaintiff from the judgment of McFarland J. dismissing the action as against the defendant Harvie. The action had previously been dismissed by consent as against the defendant Orillia Soldiers' Memorial Hospital.

March 4th, 1941. The appeal was heard by ROBERTSON C.J.O., HENDERSON and GILLANDERS JJ.A.

J. R. Cartwright, K.C., for the plaintiffs, appellants, contended that the negligence of Dr. Harvie was not merely the breach of the ordinary standard of care which exists when a professional man is charged with a failure to use reasonable and competent skill, but further was a breach of the duty owed by any person using a dangerous element, such as fire, to take special care of the safety of others; the onus was on the defendant surgeon to satisfy the Court that the fire did not occur through his negligence: *Dominion Natural Gas Co. v. Collins*, [1909] A.C. 640, at p. 646.

Furthermore, in the circumstances of this case, an inference of negligence arises because of the failure of the defendant surgeon to offer a reasonable explanation of what occurred.

Since Dr. Hipwell was a partner of Dr. Harvie, the latter is responsible in law for Dr. Hipwell's negligence: The Partnership Act, R.S.O. 1937, ch. 187, sec. 11; *Hamlyn v. Houston*, [1903] 1 K.B. 81.

D. L. McCarthy, K.C., and *W. R. West*, for the defendant Harvie, respondent, submitted that the plaintiffs did not tender any evidence in proof of the negligence alleged in the pleadings:

Hutchinson v. Robert, [1935] O.W.N. 314, wherein it was held that the doctrine of *res ipsa loquitur* does not apply to this type of case.

The defendant Harvie exercised fair, reasonable and competent professional skill and due care in the performance of the operation. The practice followed by the respondent in performing this operation was the recognized and proper practice: *Town v. Archer* (1902), 4 O.L.R. 385; *Clark v. Wansborough*, [1940] O.W.N. 67.

Cur. adv. vult.

April 3rd, 1941. ROBERTSON C.J.O.:—This is an appeal from the judgment of McFarland J., dated 4th July, 1940, dismissing the action as against the defendant Harvie. The action had already been dismissed by consent as against the other defendant Orillia Soldiers' Memorial Hospital.

The action was for damages for negligence in connection with an operation performed on the plaintiff, Bertha McFadyen, by the defendant Harvie, who is a physician and surgeon. The operation was performed at the Orillia Soldiers' Memorial Hospital on September 16th, 1939. The plaintiff Bertha McFadyen, who lives at Huntsville, had been advised by her local doctor that she required surgical treatment. She went to Orillia to consult the defendant, but he was out of town when she called, and she saw Dr. Hipwell, who occupies offices with the defendant, and is in fact his partner, although partnership is not alleged in the pleadings. Dr. Hipwell made an examination and he also advised an operation, and Dr. Harvie was to perform it, the operation to take place on the following Saturday, when Dr. Harvie would be home. In the meantime Dr. Hipwell arranged that Mrs. McFadyen should go into the hospital on Thursday night, to be there for twenty-four hours before the operation.

The operation was performed by Dr. Harvie on the Saturday morning, as arranged, Dr. Hipwell being present to assist. An anaesthetist, Dr. Baillie, and two nurses, supplied by the hospital, were in attendance. The general preparation of the patient for the operation was done by the nurses before she was brought into the operating-room, but it was necessary, before operating, to sterilize the surfaces surrounding the place of operation, as infection is a danger specially to be feared in the operation then

about to be performed. The sterilizing is done by first applying iodine, and the iodine is then washed off with alcohol. Dr. Hipwell personally did the sterilizing in this case. Both the iodine and the alcohol were applied with swabs, and another swab was then used to dry up the alcohol. In accordance with the established practice there was then a delay of from five to ten minutes to permit the alcohol to completely evaporate before commencing the operation.

When Dr. Harvie commenced the operation he first examined an ulcerated area that required to be treated, and decided that due to its condition he should cauterize it. This is done by the use of a cautery, an appliance with a tip or point that is heated by electricity conveyed to it through a rheostat by wires connected to a wall-plug. One of the nurses operated a foot-switch to turn the electric current on and off. Instantly when Dr. Harvie applied the heated cautery to the ulcerated spot there was a flash of flame that lasted for only a second. Dr. Harvie at once dropped the cautery, and he and Dr. Hipwell gave their attention to removing any drapes or coverings about the patient, fearing they might have caught fire. Both doctors and the senior nurse, who operated the switch, say these drapes did not in fact catch fire. They all say there was a momentary flash of flame the instant the cautery was applied, but there was no other blaze or flame. The senior nurse says, however, that afterwards she examined the cotton binder that was about the body of the patient, and somewhat removed from the place where the cautery was applied, and that part of it underneath the patient was discoloured as if seared with a hot iron.

A nurse-in-training whose place during the operation was at the instrument table, and who had her back to Dr. Harvie at the moment, says that she looked around on hearing the commotion and saw the doctors pulling the drapes away, and that there was flame on them. This is denied by the others.

A fresh lot of sterilized drapes and sheets had to be got and put around the patient before the operation was again proceeded with, and in the course of this a blister or seared area like a slight burn was observed, and some ointment was applied to it. The operation then proceeded and was successfully completed. When the operation was finished another dressing was applied to the burned area before the patient was removed to

her bed. Later it developed that the patient had suffered a severe burn at the place that was observed and treated in the operating-room as described. It was a long time in healing and she was caused much pain and suffering, trouble and expense as the result of it.

Dr. Harvie had performed this operation a great many times. He says that on this occasion he followed his usual practice, and that it is the practice generally adopted. He had never known of an occurrence like this in the use of the cautery.

Other doctors were called as witnesses. Dr. Woods, who had first advised the operation, was called for the plaintiffs, and Drs. Cosbie and Frawley, who are specialists from Toronto, were called for the defence. These doctors all agree that the procedure followed by Dr. Harvie in this operation was in accordance with recognized practice. None of them had ever known of such an incident as the flash of flame that occurred on this occasion on the application of the cautery, and they were unable to explain either the flash or the burn which the patient sustained.

The appellants claim that they are entitled to succeed without establishing how the burn was caused. They say the patient was in Dr. Harvie's care and rely upon the maxim *res ipsa loquitur*. Before that maxim can be applied, however, it is necessary to establish the extent of Dr. Harvie's responsibility, for he was not the only person engaged. That he was bound to exercise care and skill on his own part no one disputes. But to what extent was he responsible for the acts or negligence of the others who were present, and particularly of Dr. Hipwell? The statement of claim alleges that there was negligence on the part of Dr. Harvie or of his servants or agents, and by particulars delivered, these servants or agents are named as Dr. Baillie and Dr. Hipwell. There is nothing to suggest that Dr. Baillie, the anaesthetist, had the least connection with the events that, on any theory, could have caused the burn, and the question is whether and to what extent Dr. Harvie is liable for negligence, if there was any, on the part of Dr. Hipwell.

I do not think it can be said wholly as a matter of law that at every operation the chief surgeon is responsible for whatever may occur there, or even that in every case he is liable for negligence on the part of an assistant. Something may depend upon the character of the operation, and there may be established

rules and customs among surgeons that must be taken into account. The Court has no knowledge of operating-room procedure or practices, nor can it say, without evidence, when an assistant is reasonably required or for what purposes he may be used. So long as the presence and participation of an assistant are proper, and the assistant is a duly qualified surgeon with the skill and experience necessary for the work properly entrusted to him, I do not see how, purely as a matter of law and without evidence, the Court can find the chief surgeon responsible for negligence of the assistant. There is nothing in this case upon which the Court can say that it was not proper that Dr. Hipwell should be present to assist, or the sterilizing process be left to him to carry out. Dr. Hipwell was a practitioner of sixteen years' standing, and was familiar with the kind of operation to be performed, and had himself performed a number of them when a cautery was used. He had examined the patient before the operation, and had advised it and had made the arrangements for it. In the absence of any evidence establishing some definite reason why Dr. Harvie should have performed the operation unassisted, it is impossible for the Court to say that it was not proper that Dr. Hipwell should assist to the extent he did. Neither can Dr. Harvie be held liable for negligence on the part of his assistant unless from the circumstances disclosed in evidence, or evidence of the established custom or rule among surgeons, or something of that kind, it can be said that Dr. Harvie's duty as the surgeon in charge extended that far. There is no such evidence here.

No case was cited to us in which the responsibility of the chief surgeon for the negligence of his assistant has been placed any higher than I have suggested. Whether, in all circumstances, it is even so high is a question that need not be determined here. Not much help can be got from any reported cases here or in England. There are cases to be found in the reports of some of the United States, but, with respect, I doubt whether any principles have been established by them that should be applied here. There is an old case in England, *Hancke v. Hooper* (1835), 7 C. & P. 81, where it was said that a surgeon is liable for the inexperience and lack of knowledge on the part of an apprentice. The principle of that case may be applicable when the assistant is an intern or other person in the course of preparation for practice.

I am of the opinion that the respondent was not, therefore, either upon the evidence in the case, nor as a matter of law apart from evidence, in such a position of responsibility on this occasion that he was liable for whatever might occur, nor even for negligence of his assistant alone, and I think the principle *res ipsa loquitur* does not apply. I have not overlooked the point taken by counsel for the respondent that in a case of this character the plaintiff must definitely prove negligence, nor have I overlooked the observations by Tindal C.J. in *Hancke v. Hooper* (*supra*) that a surgeon does not become an insurer and that "if from some accident or some variation in the frame of a particular individual an injury happens, it is not a fault in the medical man." It is not necessary to discuss these matters in view of the opinion I have expressed that for other reasons *res ipsa loquitur* does not apply here.

There is no evidence of any negligence on the part of Dr. Harvie himself. The evidence of all the doctors is that he followed the recognized practice. I think we must accept Dr. Harvie's account of the actual occurrence rather than that of the nurse-in-training, supported as he is by the evidence of Dr. Hipwell and the senior nurse. They were in a much better position to see what happened and were all of greater experience and more competent observers. While the trial Judge did not make any express ruling on the matter, I think it must be taken that he accepted Dr. Harvie's account as an accurate statement.

I do not think that the definite cause of the injury to the patient in this case is established with any certainty by the evidence. Dr. Harvie, when asked what, in his opinion, was the cause of the burn, said that while he had given the matter a great deal of thought, he did not know the cause. The trial Judge said that the evidence seemed to establish clearly that the cauterizing instrument, on being brought into proximity with some excess alcohol that remained on the patient after the sterilizing process, ignited it and this caused the burn. Dr. Harvie did, it is true, suggest this, but only as a theory that might be wrong. On the evidence I do not think it is anything more than a guess.

There is an absence from the record of evidence upon much that it is important to know if it is necessary to find what caused the burn. The plaintiffs relied mainly upon *res ipsa loquitur*, and considered, no doubt, that it was not for them to show the

cause. The defendant called evidence to show that his own conduct was what it should have been, and was not concerned, in his view, with the negligence of others, if there was any negligence. The burn, it is said, was of the severity that classed it as a "third degree" burn. This appears to indicate a burn that is more than superficial. There is no evidence as to what kind or degree of heat or what length of exposure will produce such a burn. If the burn had any characteristics that would indicate its cause, there is nothing in the evidence to that effect. No witness said that such a burn could be produced by a momentary flash of flame such as was described by most of the witnesses, nor, on the other hand, did any witness say it could not be so produced. The place that was burned was so little exposed to such a flame, in comparison with other parts that were not burned, that it is not easy to see how it could have been severely burned by it. The binder around the patient's body had the appearance of having been seared a light brown colour at the part of it that was beneath the patient. How the flash of flame reached there, if it did so, no one has explained. There is no evidence to show whether or not any steps were taken to make sure that there would be no repetition of the occurrence when the operation was continued.

In the absence of evidence nothing is to be gained by surmises. There is no evidence that Dr. Harvie should have done anything that he did not do. There is no evidence upon which it can be said that Dr. Harvie should have noticed the presence of alcohol or its fumes before using the cautery, if indeed anything of the kind was present in fact. It was suggested in argument that alcohol is known to be inflammable, and is an article dangerous in itself, and that, therefore, special precautions were called for, and *Dominion Natural Gas Company v. Collins*, [1909] A.C. 640 was cited. I do not think that principle can be applied to alcohol, in any event in the small quantity used here. The evidence of all the doctors as to their experience in their use of it, as it was used here, would appear to be a sufficient answer. There is the further difficulty that it is by no means certain that alcohol had anything to do with the accident.

Counsel for the plaintiffs asked for leave to amend the statement of claim by alleging that Dr. Harvie is the partner of

Dr. Hipwell, and, therefore, liable as such for the negligence of Dr. Hipwell. He referred to secs. 11 and 13 of The Partnership Act, R.S.O. 1937, ch. 187. It was stated in the course of the evidence that Dr. Harvie and Dr. Hipwell are partners, but the trial proceeded without further reference to that circumstance and no claim arising from the relationship was made at the trial.

I think it is impossible to add such a claim now, and to pass judgment upon it. The question whether Dr. Hipwell was negligent has not been tried. There may be much that can be said that has not been said by way of defence to a claim that Dr. Hipwell was negligent and that his negligence was the cause of plaintiff's damage.

No doubt it was a great misfortune to the plaintiffs that Mrs. McFadyen should have suffered so severely while under operation, and the evidence falls distinctly short of establishing that there was not negligence on the part of some one. Dr. Harvie is, however, a surgeon of standing and experience, and I think it is impossible on the evidence to hold that the charge of negligence against him has been established.

The appeal must be dismissed with costs.

HENDERSON J.A. agreed with ROBERTSON C.J.O.

GILLANDERS J.A.:—This is a troublesome case. The plaintiff sustained severe injuries while undergoing an operation or its preliminaries, and there is much to support the view that these injuries were due to the fault and want of reasonable care by one or more of the persons engaged in carrying it out. The evidence of the two specialists called by the defence that the operation which was performed, is one of common occurrence, that the procedure followed was the recognized and approved method, and that neither of them in an extensive practice had experienced a flame or flash such as occurred in this case, lends support to the view that something was negligently done or omitted in this case, and that with proper care the burning which the plaintiff suffered should not have resulted.

The difficulty, however, is whether or not the evidence establishes liability against the defendant. Even if one should infer that the burning was the result of the improper use or drying of the alcohol wash, it is not shown by the evidence that the

defendant did not, as he was entitled to do, rely on the assumption that others, properly qualified, had completed the preparations with care and that all was in order for him to proceed as he did.

For the reasons which he has fully set out, I agree with the reasons and conclusions of my Lord the Chief Justice.

Appeal dismissed with costs.

[COURT OF APPEAL.]

Rex v. Halmo.

Criminal Law—Driving a motor vehicle recklessly or in a manner dangerous to the public contrary to sec. 285(6) of The Criminal Code—Aiding and abetting commission of such offence—Motor vehicle owned by accused and driven by his employee—Accused, his driver and all other occupants of the motor vehicle intoxicated.

The accused, with two other men, set out from the City of Windsor in a motor car owned by the accused, intending to drive to the City of London. The car was driven by a fourth man, Wilfred Mayville, who was a licensed chauffeur and whom the accused had employed to drive for the occasion. The party reached the City of Chatham early in the evening and stopped at a restaurant. Several witnesses who saw them in the restaurant testified that the accused and all his companions, including Mayville, were intoxicated. On leaving the restaurant to continue the journey to London, Mayville again drove the motor car, and the accused with one of his friends was in the back seat. They narrowly missed running into several motor cars as they drove away from the restaurant and other witnesses who saw them later testified that the motor car was swinging from one side of the road to the other. After travelling a few miles along the highway they came to a curve and the motor car failed to make the curve, crossing to the wrong side of the road, where it collided head on with a motor car travelling in the opposite direction in its proper position on the highway. The speed of the accused's motor car at the time was said to have been eighty miles per hour. Mayville and the companion of the accused sitting in the front seat were killed in the collision and two occupants of the other motor car were also killed.

The accused was charged that he did "aid, abet, counsel or procure Wilfred Mayville to drive a motor vehicle No. 88-M-12 on a street, road, highway or other public place, recklessly or in a manner dangerous to the public, having regard to all the circumstances of the case, contrary to the form of the Statute in such cases made and provided, sec. 285(6) of The Criminal Code."

On the above charge the accused was convicted in County Court Judges Criminal Court of the offence of reckless or dangerous driving, contrary to sec. 285(6) of The Criminal Code.

The accused appealed to the Court of Appeal from his conviction and the appeal of the accused was dismissed:

- (1) The accused was charged in express terms with an offence against sec. 285(6) and if he did aid, abet, counsel or procure Mayville to drive his motor car in the manner in which it was in fact driven, he was guilty of a breach of sec. 285(6), and sec. 69 of the Code beyond question warrants his prosecution for an offence under sec. 285(6): *Remillard v. The King*, 35 C.C.C. 227, applied. It was unnecessary to allege in the charge that the accused "did aid, abet, counsel or procure Wilfred Mayville", since by force of sec. 69 it would have been sufficient and perhaps better pleading to charge him simply with the offence that Mayville in fact committed, but the insertion of the unnecessary words did not invalidate the charge nor prevent it from being a good and sufficient charge of an offence under sec. 285(6).
- (2) The owner of a motor-car driven by a man hired for the occasion, the owner also riding in the car, may be convicted under sec. 285(6) of the Criminal Code, for the reckless or dangerous driving of his hired driver, who had become intoxicated on the journey and in the company of the owner. The fact that the owner also was drunk was not a defence in the circumstances of the case.

AN appeal by the accused who was convicted by His Honour Judge Uriah McFadden in the County Judges Criminal Court

for the County of Kent of the offence of reckless or dangerous driving contrary to sec. 285(6) of The Criminal Code.

The accused was charged "for that the said Anton Halmo on the 10th day of July, 1940, at the Township of Camden did aid, abet, counsel or procure Wilfred Mayville to drive a motor vehicle No. 88-M-12 on a street, road, highway or other public place, recklessly or in a manner dangerous to the public having regard to all the circumstances of the case contrary to the form of the Statute in such cases made and provided, sec. 285(6) of The Criminal Code."

April 7th and 8th, 1941. The appeal was heard by ROBERTSON C.J.O., MASTEN and GILLANDERS JJ.A.

J. R. Cartwright, K.C., and *J. H. Clark*, K.C., for the accused, appellant.

C. L. Snyder, K.C., for the Crown.

April 23rd, 1941. ROBERTSON C.J.O.:—This is an appeal from the conviction and sentence of the appellant by His Honour Judge Uriah McFadden, on the charge of aiding, abetting, counselling and procuring one Wilfred Mayville to drive a motor vehicle recklessly, or in a manner dangerous to the public, contrary to sec. 285(6) of The Criminal Code. Appellant was tried in the County Judges Criminal Court of the County of Kent.

On 10th July, 1940, appellant, with two other men, set out from Windsor in appellant's motor car, intending to go to London. The car was driven by a fourth man, one Wilfred Mayville, a licensed chauffeur, whom appellant had employed to drive for this occasion. The party reached Chatham about 7 o'clock in the evening, and stopped at a restaurant for something to eat. Several witnesses who saw them there say that appellant and all his companions, including the driver Mayville, were drunk. On leaving the restaurant to continue the journey Mayville was again the driver, and appellant, with one of his friends, was in the back seat. They narrowly missed running into several other motor cars as they got away from the restaurant, and witnesses who saw them farther on, say the motor car was swinging from one side of the road to the other. After travelling a few miles they approached Thamesville, where there is a curve in the road, and appellant's car failed to make the curve. It crossed to the wrong side of the road where it collided head-on with a motor car travelling in the opposite direction in its proper position on

the highway. The speed of appellant's motor-car at the time is said to have been eighty miles per hour. Mayville and the man sitting in the front seat with him were killed in the collision, and two occupants of the other car were also killed.

It is objected for appellant, first, that he was not charged with an offence under sec. 285(6) of The Criminal Code, under which he was convicted and sentenced, but with an offence under sec. 69. The contention is that if it were intended to charge appellant under sec. 285(6) he should have been charged directly with reckless or dangerous driving, even if his part in it was only to aid, abet, counsel or procure another to drive in that manner, and that when the charge is aiding, abetting, counselling or procuring another to commit an offence, that is a charge of a substantive offence created by sec. 69. *Brousseau v. The King* (1917), 56 S.C.R. 22 was cited.

I do not think effect can be given to the objection. Appellant was charged in express terms with an offence against sec. 285(6), and if he did aid, abet, counsel or procure Mayville to drive his motor car in the manner in which it was in fact driven, he was guilty of a breach of that subsection, and sec. 69, beyond question, warrants his prosecution for an offence under sec. 285(6): *Remillard v. The King* (1921), 35 C.C.C. 227. It was unnecessary to allege in the charge that appellant "did aid, abet, counsel or procure Wilfred Mayville", for by force of sec. 69 it would have been sufficient, and perhaps, better pleading, to charge him simply with the offence that Mayville in fact committed. The insertion of the unnecessary words did not, in my opinion, invalidate the charge, nor prevent its being a good and sufficient charge under sec. 285(6). Appellant was assisted rather than injured by the more specific statement of his relation to the offence with which he was charged.

Counsel for appellant further argued strongly that there is no evidence to sustain the charge. He objected that it is not enough that appellant was present and did nothing. It is not disputed that Mayville was driving in a manner that sec. 285(6) forbids, nor that appellant was riding in the car with him and was the owner of the car. The contention is that it was necessary for the Crown to prove at least that appellant knew Mayville was driving recklessly or dangerously and that appellant was in a position to prevent it. Appellant's counsel cited in support of this proposition *Rex v. Dumont* (1921), 49 O.L.R. 222, at p.

230; *The Queen v. Coney* (1882), 8 Q.B.D. 534, at p. 557; *Ducros v. Lambourne*, [1907] 1 K.B. 40, and other cases. He argued that appellant was unquestionably drunk and that it cannot be assumed against him that he had any appreciation, or even knowledge, of the dangerous character of Mayville's driving, or that he was even awake at the time, or, even if he knew all about it, that he was capable of either the mental or physical energy necessary to control Mayville.

Counsel for the Crown relied upon sec. 247 of The Criminal Code as fixing the responsibility of appellant. Section 247 is as follows:

"247. Every one who has in his charge or under his control anything whatever, whether animate or inanimate, or who erects, makes or maintains anything whatever which, in the absence of precaution or care, may endanger human life, is under a legal duty to take reasonable precautions against, and use reasonable care to avoid, such danger, and is criminally responsible for the consequences of omitting, without lawful excuse, to perform such duty."

I doubt whether sec. 247 can be relied upon to fasten criminal liability upon an accused as having aided and abetted another in committing an offence under sec. 285(6): *Rex v. Baker*, [1929] S.C.R. 354, and *Union Colliery Co. v. The Queen* (1900), 31 S.C.R. 81, per Sedgewick J. It is to be borne in mind that sec. 285(6) created a new offence and was enacted only in 1938 (2 Geo. VI, ch. 44, sec. 16) while sec. 247 states a common law offence.

It is not necessary, I think, to refer to sec. 247. That appellant was the owner of the motor car, that Mayville was his hired driver, and that appellant was himself riding in the car throughout the journey, are facts that must be taken into account and in my opinion they warrant the finding of the learned trial Judge, in the circumstances of the case, that appellant was a party to the offence of reckless and dangerous driving.

In *Ducros v. Lambourne*, [1907] 1 K.B. 40, the motor car was driven at an excessive and dangerous speed by a lady, a certificated expert motor car driver, with a license to drive. Accused was the owner of the motor car and was sitting by her side, and in control of the car, and the lady was driving with his consent and approval, and he could have prevented her from driving at an excessive and dangerous speed, but he did not interfere in any way. It was held that upon this state of facts

accused was properly convicted as having aided and abetted the commission of the offence.

In *Rex v. Longbottom* (1849), 3 Cox C.C. 439, two men in a gig, while intoxicated, ran over a deaf man who was walking in the centre of the roadway. Both of them were convicted, both being in charge of the vehicle, although both could not have been driving.

In *Regina v. Salmon* (1880), 6 Q.B.D. 79, three men went into a field to practise firing with a rifle. There were roads and houses near, and they took no precautions although the rifle could be deadly at a mile. All three fired shots and one of the shots killed a boy who was in a garden about 400 yards away. All three were convicted of manslaughter. Stephen J. put the matter in this way: "Firing a rifle under circumstances such as in the present case was a highly dangerous act, and all are responsible, for they unite to fire at the spot in question, and they all omit to take any precautions whatever to prevent danger."

These cases and many others establish the principle that the conduct of the accused, to constitute aiding and abetting, need not be some active participation at the moment the crime is committed. Here the appellant, the owner of the motor car, had placed it in the hands of Mayville to drive, as his servant, he himself also riding in the car. He was there when Mayville, in an intoxicated condition, resumed driving on leaving the restaurant at Chatham, and he then permitted Mayville to continue to drive in spite of early and continued evidence of his incapacity. The collision with another motor car and the killing of four men are not essential elements of the crime under sec. 285(6). Driving in a reckless or dangerous manner was the offence independently of the consequences that followed.

Counsel for appellant urged that on the evidence for the Crown appellant was drunk when in the restaurant at Chatham, and also when he left there, and he argued that it is necessary that the Crown should prove that appellant was still in a condition to know that Mayville was driving in a reckless or dangerous manner, and to prevent it, and that proof that appellant was present is not enough when the charge is that he aided and abetted.

I do not think that burden was on the Crown. It will be presumed that appellant was in possession of his faculties, both

mental and physical, until the contrary is shown: *Regina v. Monkhouse* (1849), 4 Cox C.C. 55. If he intended to rely on the defence that he was incapable through drunkenness, of appreciating the condition of Mayville, or of preventing him driving while intoxicated, it was for appellant to see that the necessary evidence was brought out. A man may be in a condition properly described as drunk, and yet be criminally responsible for his acts.

In *Director of Public Prosecutions v. Beard*, [1920] A.C. 479, where the question was whether the crime amounted to murder or only to manslaughter, the third rule to be applied in such cases is stated at p. 502 as follows:

"3. That evidence of drunkenness falling short of a proved incapacity in the accused to form the intent necessary to constitute the crime, and merely establishing that his mind was affected by drink so that he more readily gave way to some violent passion, does not rebut the presumption that a man intends the natural consequences of his acts."

The incapacity set up as a defence must be proved, and is not proved merely by evidence that appellant was drunk, for there are degrees of drunkenness. Appellant did not seek to carry the evidence farther than that.

In my opinion the conviction can also be sustained on broader grounds than the failure of appellant to establish his incapacity. It is proper to have regard to appellant's whole conduct.

There is nothing to indicate that when appellant set out from Windsor with Mayville as his hired driver, either of them was otherwise than sober. The presumption, in the absence of evidence, is that the condition of both of them was normal. If, when the party set forth, Mayville was not sober, he should not have been permitted to go as driver of the motor car. It was further appellant's duty to see that the driver did not get drunk on the journey, or, if he did, to discharge him. Appellant cannot escape his responsibility by saying that they all got drunk together. That is something he could have prevented, and that it was his duty to prevent. Mayville's incapacity to drive safely did not develop all at once. He was so obviously unfit to drive when the party left the restaurant at Chatham that one of the bystanders offered to drive them in his stead. It is a reasonable inference that the drinking had begun some time before, and that the process of getting drunk was a gradual one in the case of appellant, and of Mayville as well. This, it was appellant's

legal duty to take precautions against while he could. Instead of preventing it he was apparently a party to it. Appellant's participation in the dangerous driving is not to be determined solely on evidence of his condition at the time of the accident or immediately before it. In my opinion he is equally a party to the offence if he neglected his duty to see that the driver of his motor car did not, while in his employ and in his company, become intoxicated and incapable of driving safely.

There is an appeal also from the sentence imposed, which was one year definite in the Ontario Reformatory and six months' indeterminate, together with a fine of \$500.00. The sentence may be heavier than the usual sentence for offences under sec. 285(6), but it is well within the maximum provided by statute. This was a very grave offence indeed and the consequences were most serious, yet appellant, from what appears, gave little heed to the danger to which others were exposed by his conduct. To reduce the sentence is, under the circumstances, out of the question.

The appeal therefore fails and should be dismissed.

MASTEN J.A.:—Appeal by the accused from his conviction dated March 1st, 1941, under which he was sentenced by His Honour Judge McFadden to one year determinate and six months indeterminate in the Ontario Reformatory, and to pay a fine of \$500.00.

The indictment is "for that the said Anton Halmo on the 10th day of July, 1940, in the year of Our Lord One Thousand Nine Hundred and Forty at the Township of Camden in the said County did aid, abet, counsel or procure Wilfred Mayville to drive a motor vehicle No. 88-M-12 on a street, road, highway or other public place, recklessly or in a manner dangerous to the public having regard to all the circumstances of the case contrary to the form of the Statute in such cases made and provided, sec. 285(6) of The Criminal Code."

The learned trial Judge concludes his judgment at p. 64 of the evidence as follows: "For the reasons above set out I find the accused guilty of the charge of reckless driving as set out in Section 285(6) of The Criminal Code of Canada."

The sections of The Criminal Code which are alleged by the Crown to govern the criminal liability of the accused are secs. 69, 285(6) (a) and 247 and they read as follows:

"69. Accessories, principals, etc.—Every one is a party to and guilty of an offence who

(a) actually commits it; (b) does or omits an act for the purpose of aiding any person to commit the offence; (c) abets any person in commission of the offence; or (d) counsels or procures any person to commit the offence."

"285. (6) Reckless driving—Every one who drives a motor vehicle on a street, road, highway or other public place recklessly, or in a manner which is dangerous to the public, having regard to all the circumstances of the case, including the nature, condition, and use of the street, road, highway or place, and the amount of traffic which is actually at the time, or which might reasonably be expected to be, on such street, road, highway or place, shall be guilty of an offence and liable

"(a) upon indictment to imprisonment for a term not exceeding two years or to a fine not exceeding one thousand dollars or to both such imprisonment and fine;"

"247. Dangerous things.—Every one who has in his charge or under his control anything whatever, whether animate or inanimate, or who erects, makes or maintains anything whatever which, in the absence of precaution or care, may endanger human life, is under a legal duty to take reasonable precautions against, and use reasonable care to avoid, such danger, and is criminally responsible for the consequences of omitting, without lawful excuse, to perform such duty."

I share the doubts expressed by my Lord the Chief Justice as to whether under this indictment sec. 247 of the Code can be relied on by the Crown, though no doubt a count might have been added based on that section; but for reasons hereafter stated, I am of opinion that apart from sec. 247 the conviction should be maintained.

In his notice of appeal the defendant sets forth the following grounds:

"That the learned Judge misdirected himself with regard to the nature of the offence charged, and convicted the accused of an offence which was not the offence charged in the Indictment.

"That there was no evidence that the accused committed the offence charged.

"That the Indictment upon which the accused was tried does not disclose any offence.

“That the learned Judge improperly permitted the Indictment charging the offence to be amended by Counsel for the Crown at the trial to add the words ‘aid and abet’ to the Charge as laid.

“That the learned Judge misdirected himself as to the onus of proof in a criminal case.

“That the learned Judge misdirected himself as to the ingredients of the offence of reckless driving under Section 285, subsection 6(a) of the Criminal Code.”

On the hearing of the appeal the foregoing general grounds of objection were restated by Mr. Cartwright, counsel for the accused, as follows:

(a) that the accused was charged as a separate offence under sec. 69 of The Criminal Code with procuring Mayville to commit the offence set forth in the indictment, and that notwithstanding the fact that the indictment was for “procuring &c.” he was convicted of dangerous driving under sec. 285(6)(a) contrary to law:

(b) that the only real charge being under sec. 69, it is not an *indictable* offence but merely “an offence” for which a less penalty only can be imposed;

(c) that there was no evidence of procuring or of aiding or abetting Mayville (who actually drove the car) in driving to the danger of the public; and

(d) that the learned trial Judge misdirected himself on the question of onus.

Mr. Cartwright’s first argument was that the only crime charged in the indictment is under sec. 69, viz., of “aiding, abetting, counselling or procuring” a breach of sec. 285(6), that this is a separate and distinct offence, and that the accused was illegally convicted not of the offence charged in the indictment under sec. 69, but of the offence of driving to the danger of the public contrary to sec. 285(6)(a).

In support of that contention he relies on the case of *Brousseau v. The King* (1917), 56 S.C.R. 22. In that case the accused, being the mayor of a municipality, demanded of a contractor \$500.00 for his aid in procuring for the contractor a new contract. The contractor did not accede to Brousseau’s demand and the bribery did not take place, but Brousseau was convicted of “counselling or procuring”. At p. 23 Fitzpatrick C.J. says: “If the offence is committed then the accused is a party to it or if the offence is not committed then he who counsels is guilty of

a substantive offence". The case turned on the word "counsels", the bribery which the accused counselled not having taken place. The judgment determines only that under sec. 69 a person can be convicted as a distinct offence of the crime of "counselling" bribery, but it goes no further than that, and as pointed out by Fitzpatrick C.J. "If the offence is committed then the accused is a party to it." Consequently he may be convicted of the offence which he has procured or abetted, that is to say, in the present case Halmo can be convicted of a breach of sec. 285(6).

This circumstance serves to distinguish the present case from *Rex v. Brousseau*, for sec. 69 is not exclusive if the crime which is procured or abetted is accomplished or brought to pass.

I think that the indictment gives full notice to the accused of that which was charged against him.

Turning then to the question of the evidence required to support the indictment, I observe that though the evidence is in some respects sketchy and meagre, yet certain salient facts appear and are not in dispute. The accused, Halmo, was the owner of the car, and he hired Mayville, a professional chauffeur, to drive it for him from Windsor to London. The occupants of Halmo's car were the driver Mayville, the accused Halmo, and two others John Turansky and Charles Newberry. On the way they stopped at Chatham and went into a grill or place of refreshment. While there and when they emerged they were all intoxicated. Exactly when and where they imbibed the alcohol which made them drunk does not appear. When they reached the motor car of the accused it would seem to have become evident to the accused Halmo that Mayville, the chauffeur, was too drunk to drive, and he with the assistance of another tried to put him into the back seat of the car but they failed to effect this purpose. At this juncture Mayville discovered that he had lost his glasses, or spectacles, and he together with a bystander, named Sketcher, went back to the grill for them. Somebody at the door of the grill handed Mayville his glasses. At the same time it was discovered that the keys for turning on the power of the motor had also been left in the grill and the waiter put them on the counter; Sketcher picked them up, carried them out and handed them to Newberry, who apparently passed them over to Mayville, who had by this time seated himself behind the wheel. Mayville then started the car and began to drive it for the purpose of going to London. In backing out and getting

started he at first proceeded very slowly, but nevertheless he barely escaped colliding with some three or four different cars in the process of getting started on his way, but the accused sitting in the back seat of the car did not interfere in any way.

Before the car started the witness Sketcher, recognizing the condition in which the party was, offered to drive, but Newberry, who was sitting in the front seat beside Mayville and appeared less intoxicated than the others, declined this offer. Sketcher and others in Chatham were so impressed with the dangerous condition of the party that they followed the car of the accused for some eight miles. It appears that after passing a certain bridge the speed of the car was increased up to something like 80 miles, and it swayed from side to side on the road. Finally it crashed into another car, killing two men in that car, while Newberry and Mayville were both fatally injured.

It seems to me to be a fair inference from Halmo's action in trying to put Mayville into the back seat that Halmo was capable of appreciating and did appreciate Mayville's drunken condition, and that when he desisted from that attempt and himself took the rear seat along with Turansky and witnessed Mayville getting in behind the wheel and receiving the keys of the car, he was in effect directing his servant to drive to London though he knew he was too drunk to drive properly.

The time that elapsed between the abortive effort to prevent Mayville driving and the time when Mayville got behind the wheel and received the keys from Newberry in the presence of Halmo, sitting in the back seat, must have been very short according to the evidence, and it is unreasonable to suppose that in that short time Halmo lapsed into unconsciousness, as suggested by counsel for the accused.

As to whether the accused should be excused on the ground of his drunken condition, I agree with my Lord the Chief Justice whose judgment I have had the privilege of reading, and I have nothing to add to what has fallen from him on that question.

Three facts combine to make the accused a person who had in his charge and under his control the motor vehicle in question:

- (a) He was the owner of the motor vehicle;
- (b) He was the master of Mayville, his hired servant, who was driving the car;

(c) He was personally present at all material times both before and at the time when the motor vehicle was being driven in a manner dangerous to the public.

Being personally present and having in his charge and under his control the motor vehicle, he is a principal party to the offence of a breach of sec. 285(6) of the Code: *R. v. Brown* (1878), 14 Cox C.C. 444. He was guilty of negligence in that being so in charge and control of a dangerous machine he failed and omitted to control his drunken chauffeur and to prevent him from driving the car to the danger of the public.

He comes within the general principle as stated by Duff C.J.C. in *The King v. Baker*, [1929] S.C.R. 354, where in discussing *McCarthy v. The King*, 60 S.C.R. 40, he says:

"Speaking generally, a want of ordinary care in circumstances in which persons of ordinary habits of mind would recognize that such want of care is not unlikely to imperil human life, falls within that category (culpable negligence). But the decision does not attempt to lay down an abstract rule for determining the incidence of criminal responsibility for negligence."

And while in the *McCarthy* case Mignault J. imports sec. 247, he adds these words:

"It was the duty of the accused to take reasonable precautions to avoid endangering human life. The jury was told so and it was then for the jury to determine whether he had taken those precautions."

Whether the negligence of the accused in omitting to prevent Mayville from driving did under all the circumstances establish such a degree of negligence as to be criminally culpable was a mixed question of law and fact on which the trial Judge has found against the appellant. I would be unwilling to reverse his finding.

I note that the principle, as above stated, was applied under similar circumstances in the case of *Ducros v. Lambourne*, [1907] 1 K.B. 40, where the conviction was maintained.

I confess my inability to appreciate Mr. Cartwright's second point, namely, that this is not an indictable offence but is only an offence triable by way of summary trial. As the accused was present when the offence was committed he is not an accessory but a principal, if anything (*R. v. Brown* (1878), 14 Cox's Criminal Cases 444) and the crime is a breach of sec. 285(6).

In respect of the third ground of Mr. Cartwright's argument that there was no evidence of procuring or aiding or abetting

Mayville, the statement of occurrences, as I have indicated them heretofore, affords, I think, a sufficient answer.

No doubt the learned trial Judge did misdirect himself in certain respects on the question of onus, but that misdirection had no bearing upon the ultimate result which must be as already indicated. I would not vary the terms of the conviction, and would dismiss the appeal.

GILLANDERS J.A.:—The accused, appellant, was convicted in the County Judges Criminal Court of the County of Kent on a charge, “for that he did on the 10th day of July, 1940, at the Township of Camden, in the said County, aid, abet, counsel or procure Wilfred Mayville, to drive a motor vehicle No. 88-M-12 on a street, road, highway or other public place, recklessly or in a manner dangerous to the public, having regard to all the circumstances of the case, contrary to Section 285, subsection 6 of the Criminal Code, and sentenced to one year determinate in the Ontario Reformatory, and six months indeterminate, together with a fine of \$500.00; in default of payment of the fine, five months additional imprisonment, and also prohibited from driving a motor vehicle for two years, dating from the expiration of the said sentence.”

The facts given are not in dispute, although in some rather important respects the evidence is very sketchy.

The accused Halmo is the owner of a Buick automobile in which he was proceeding from Windsor to London. The car was being driven by one Mayville, a paid chauffeur in the employ of the accused. The evidence is silent as to where and why Mayville was engaged, but both the accused and Mayville were resident in Windsor, and it is said by counsel that because the accused, who desired to proceed to London, had been drinking, he did not wish to drive, and engaged Mayville as chauffeur. There is no evidence as to the trip from Windsor to Chatham, but the evidence shows that the accused with Mayville, one Turansky a friend of the accused, and one Newberry, who, it is said, had been picked up on the road, were together in a restaurant in Chatham and were all more or less intoxicated. The four were in a booth and, it is said, were drinking, although the witness could not swear they were drinking intoxicants. There is evidence that they were “playing the fool” in the restaurant, that Halmo and Turansky were wrestling on the floor. They were

told by the waiter that they could not drink in there, whereupon one protested "it is water" and the waiter said "It don't look like water to me. Take it and get out." "Mayville, the driver, got up and went to go around the counter and the waiter pushed him back and he wouldn't go and the waiter hit him . . . and he fell down and dropped his glasses." "The waiter helped pick him up and then he and the men took him outside."

I think it would be a fair inference that the four were drinking intoxicants together in the restaurant.

Halmo's car was standing in front of the door and he and one of the others endeavoured to push Mayville into the back seat, but they were unable to do so. Whether this was done with the thought that he, Mayville, was not fit to drive by reason of drinking, or was mere "horse play" is not clear. It is said that Halmo, Turansky and Mayville "were apparently quite drunk" and that Newberry was "the soberest one of the bunch." Finally Halmo and Turansky got in the back seat. The keys to the car and Mayville's spectacles had been left in the restaurant. These were brought out by a customer who had been in the restaurant and the keys were handed to Newberry and by him to Mayville, who sat in the driver's seat, and who proceeded without objection from the accused to operate the car. Although the party got out of Chatham and proceeded for some fourteen miles toward London before a serious accident occurred, there is evidence that almost from the moment the car started to move it was operated negligently. While backing up it almost hit a car and it nearly collided with the two cars waiting for the light at a nearby corner. A customer in the restaurant, apparently anticipating trouble, followed the car for some distance. He says after narrowly escaping the collisions as mentioned, it was driven cautiously and carefully out No. 2 Highway for a distance of approximately two miles, then started gaining speed and going from one side of the road to the other. Near the outskirts of the Village of Thamesville, in broad daylight, shortly after 7 P.M., the accused's car driven by Mayville at a terrific rate of speed failed to make a curve in the road and crashed into a westbound Ford motor car. Mayville, the driver, was killed instantly. Newberry, who had been riding in the front seat with the driver, died the same night. Two passengers in the Ford car were so badly injured they died the next day. Other passengers in both cars, including the accused himself, were seriously injured, and pas-

sengers in a third car against which the Ford car was thrown were also injured.

It is clear from the evidence that the disaster was due wholly to the grossly negligent manner in which the accused's car was being driven, and this is not denied by counsel for the appellant.

Several points were ably and fully argued by appellant's counsel. It is urged,

(1) that the accused is not charged under sec. 285(6) of the Code, and should not on this charge be convicted and sentenced under the provisions of that section;

(2) that the charge is one of "aiding, abetting, counselling or procuring" and falls under sec. 69 of the Code; that a charge under this section is not an indictable offence, and the trial Judge was without jurisdiction. In support of the contention that the charge is one of a specific and substantive offence under sec. 69, counsel relies on *Brousseau v. The King* (1917), 56 S.C.R. 22;

(3) that in any event the charge rests on aiding, abetting, counselling or procuring the offence of dangerous driving, and that there is no evidence upon which a conviction can properly be based;

(4) that the learned County Court Judge misdirected himself on the question of onus and *mens rea*.

As to the third point taken by counsel that there is no evidence of aiding, abetting, counselling or procuring, on the argument of the appeal I was much impressed with the cogency of this submission. Murray's English Dictionary says, in part, respecting "abet"; "1. To urge on, stimulate (a person to do something) . . . (4) esp. in a bad sense; to encourage, instigate, countenance a crime or offence, or anything disapproved of."

Halsbury's second edition, vol. 9, page 30, says:

"To constitute a principal in the second degree mere presence at the crime is not enough; there must be a common purpose and intent to aid or encourage the persons who commit the crime and either an actual aiding or encouraging or a readiness to aid and encourage them if required."

In *The Queen v. Coney* (1882), 8 Q.B.D. 534, Hawkins J. says at page 557:

"In my opinion to constitute an aider and abettor some active steps must be taken by word, or action, with the intent to instigate the principal, or principals. Encouragement does not of

necessity amount to aiding and abetting, it may be intentional or unintentional, a man may unwittingly encourage another in fact by his presence, by misinterpreted words, or gestures, or by his silence, or non-interference, or he may encourage intentionally by expressions, gestures, or actions intended to signify approval. In the latter case he aids and abets, in the former he does not. It is no criminal offence to stand by, a mere passive spectator of a crime, even of a murder. Non-interference to prevent a crime is not itself a crime. But the fact that a person was voluntarily and purposely present witnessing the commission of a crime, and offered no opposition to it, though he might reasonably be expected to prevent and had the power so to do, or at least to express his dissent, might under some circumstances afford cogent evidence upon which a jury would be justified in finding that he wilfully encouraged and so aided and abetted."

There is no evidence as to whether or not the accused did anything or said anything with a view to stopping Mayville from driving after he started to drive recklessly and dangerously. It might be thought, if the accused ordered Mayville to desist or cease driving, he would obey, since Mayville was the accused's servant.

Before Mayville actually started to drive away from the restaurant, the master by getting in the back seat of the car and sitting down without getting or asking for the keys to the car or making other arrangements for the driving, and permitting Mayville to get the keys and take his place behind the wheel, impliedly ordered or invited Mayville, the chauffeur, to drive on. Mayville was then drunk in the opinion of witnesses who saw him; and I think it is clear that the accused thereby abetted Mayville to commit a breach of sec. 285(4), *i.e.*, driving the automobile while intoxicated.

What conclusion should be drawn from these facts on the charge of dangerous driving? Did the accused under the circumstances signify his approval of Mayville driving dangerously so that it could be said he abetted that crime? On the argument I doubted whether one should so hold, but on consideration I think that in the circumstances here the offence is established. Mayville's intoxicated condition indicated his unfitness to drive. It is evident that the witness Sketcher, who asked "How about me driving?" and who later followed the accused's car apparently anticipating disaster, thought him unfit to drive. It seems draw-

ing too fine a line under these circumstances to say that in signifying his approval of Mayville operating the car he did not thereby approve of the dangerous and grossly negligent driving which might reasonably be anticipated, and which in fact was apparent from the outset.

I think further that the accused having approved and impliedly ordered the driving by Mayville in his intoxicated condition, which was in itself illegal, if as a result of that, or in the course of that driving, Mayville drove dangerously, the accused must be held to have abetted such dangerous driving. See Halsbury, second edition, vol. 9, para. 32 and cases there cited.

Several cases were cited where persons other than the actual driver were convicted of offences in connection with the driving. In *Ducros v. Lambourne*, [1907] 1 K.B. 40, there was a conflict of evidence as to whether the car was being driven by the appellant or a lady seated by his side in the car; but without deciding this question, it was held that there was evidence on which the appellant could be convicted of aiding and abetting the offence of dangerous driving. It is pointed out, however, that the case as stated for the opinion of the Court included the statement that if the lady was driving, the appellant, who was in control of the car, could and ought to have prevented her from driving at an excessive and dangerous speed, but allowed her to do so and did not interfere in any way.

In *Rex v. Baldessare* (1930), 22 Crim. App. R. 70, two men, who had taken a car which did not belong to them for the purpose of a joy-ride, and ran down and killed a pedestrian, were both convicted of manslaughter. Although it does not appear from the report that the question of aiding and abetting was considered, the conviction against both was upheld, the Court being of opinion that the jury were entitled to find that both of the accused were responsible for the way in which the car was being driven at the moment of the collision.

It is urged that *mens rea* is a necessary ingredient of the offence, and that by reason of his own drunkenness the accused was unable to form any intent. If that were established it might well be a defence, but the onus of establishing such a defence rests on the accused, and while the evidence here shows the accused was intoxicated to a degree, it does not establish this defence.

It must, I think, therefore, be held that

(1) the accused knew the driver was intoxicated and in no condition to drive when the party left the restaurant in Chatham and were about to proceed in the accused's automobile;

(2) he had then every opportunity to prevent Mayville from driving by taking the keys to his own motor car or ordering his chauffeur, Mayville, not to drive.

As to points 1 and 2 relating to the wording of the charge, since writing the above I have had the opportunity of reading the judgment of my Lord the Chief Justice, and agree with his views. The appeal must be dismissed.

Appeal dismissed.

[COURT OF APPEAL.]

Town of Timmins v. The Pamour Porcupine Gold Mines Ltd.

Assessment and taxation—Poll tax—Recovery of tax from employer—Employer not resident in municipality—The Statute Labour Act, R.S.O. 1937, ch. 274, sec. 2(3).

By sec. 2(1) of The Statute Labour Act, R.S.O. 1937, ch. 274, councils of cities, towns, villages and townships may pass by-laws for levying and collecting an annual tax to be known as poll tax of not less than \$1.00 and not more than \$10.00 from certain male inhabitants of the municipality.

By sec. 2(3) of the Act it is provided that "where any such male inhabitant has been employed by the same person for not less than thirty days such employer shall pay over to the collector on demand out of any wages due to such employee the amount of such tax and such payment shall relieve the employer from any liability to the employee for the amount so paid."

Held, that under sec. 2(3) of the Act the employer of a male inhabitant who is liable for poll tax must pay over such poll tax to the collector on demand out of any wages due to the employee even though the employer is not resident within the boundaries of the municipality.

AN appeal by the plaintiff from a judgment of His Honour Judge Danis, of the District Court of the District of Cochrane, whereby an action for the recovery of poll tax under The Statute Labour Act, R.S.O. 1937, ch. 274, was dismissed.

By sec. 2(1) of the Act councils of cities, towns, villages and townships may pass by-laws levying and collecting an annual tax to be known as "poll tax" of not less than \$1.00 and not more than \$10.00 from certain male inhabitants of the municipality.

By sec. 2(3) of the Act it is provided that, "Where any such male inhabitant has been employed by the same person for not less than 30 days, such employer shall pay over to the collector on demand out of any wages due to such employee the amount of

such tax and such payment shall relieve the employer from any liability to the employee for the amount so paid."

April 16th, 1941. The appeal was heard by ROBERTSON C.J.O., MIDDLETON and HENDERSON JJ.A.

J. R. Cartwright, K.C., for the plaintiff, appellant, contended that under sec. 2(3) of the Act a municipality has the right to collect poll tax from the employer of a resident of the municipality although such employer is not resident within the municipality. The authority of the municipality to demand that an employer deduct poll tax from his employee's wages and pay it to the collector does not depend upon the power of the council to pass a by-law but rests solely on sec. 2(3) of the Act which contains no limitation as to the location or residence of the employer.

The action of the municipality in making a demand pursuant to sec. 2(3) is similar to the serving of a notice of garnishment or attachment upon a person indebted to a taxpayer liable to the municipality.

W. S. Walton, for the defendant, respondent, contended that since the defendant was not located in the Town of Timmins and did not carry on business there, it was not among the class of employers contemplated by sec. 2(3) of the Act.

The jurisdiction of a municipal council is confined to the municipality which it represents: *The Municipal Act*, R.S.O. 1937, ch. 266, sec. 267(1); *In re Ottawa Electric Railway Co. Ltd. and The Town of Eastview* (1924), 56 O.L.R. 52.

Cur. adv. vult.

April 24th, 1941. The judgment of the Court was delivered by HENDERSON J.A.:—An appeal from the judgment of His Honour Judge Danis of the District Court of the District of Cochrane, dated February 18th, 1941.

The action is brought under sec. 2(3) of *The Statute Labour Act*, R.S.O. 1937, ch. 274, in respect of poll tax imposed upon male inhabitants of the Town of Timmins, employed by the defendant; and counsel agree that in respect of the moneys now claimed, the facts required to be proved have been proved, viz., that the male inhabitants in question have been employed by the defendant company for not less than thirty days; that wages sufficient to pay the taxes claimed were owing to the respective employees at the time of the demand and that the demand was

duly made; and counsel further agree that the amount which the plaintiff is entitled to recover can be computed by them without the Court being required to do so.

The learned District Judge decided against the plaintiff on the ground that the defendant is resident outside the Town of Timmins, and that the authority of the Municipality is confined to its territorial limits, and also upon the ground that the section in question imposes a duty on the defendant, under certain circumstances, but does not confer any right of action against it.

With respect, I am of opinion that the learned District Judge is in error and that upon the admitted facts a right of action is conferred upon the plaintiff, and that the plaintiff is entitled to enforce its claim by action although the defendant is not resident within its boundaries. It is true that many powers are conferred upon municipalities which can only be exercised within their territorial limits, but in my opinion the right of the Town to collect taxes due to it by taxpayers, or in respect of which a right of action is conferred against some one other than the taxpayers, is not so limited.

Mr. Walton further argued that the right of the collector to demand the tax was limited to the territorial limits of the Town. In my opinion this contention cannot succeed. If the right of the collector to demand taxes is limited to persons who are within the territorial limits of his municipality, then any non-resident ratepayer would escape payment of taxes. I think the Statute must be construed reasonably and when the collector is authorized to make a demand for the tax it follows that he may demand it from the person liable, in this case the taxpayer's employer, wherever the latter may be.

The Statute leaves much to be desired inasmuch as conditions might easily arise which would make its provisions difficult to determine or to enforce. It is quite conceivable that individuals who move their place of residence from one municipality to another might be assessed for poll tax in more than one municipality in the same year, and no provision is made to enable the Court to determine the priority of the right, in such an event.

Section 2, subsec. (1) (d), of the Act provides for levying and collecting the poll tax from every male inhabitant of the Municipality who has not filed with the Clerk a certificate showing that he has been assessed or performed statute labour, or paid poll tax, elsewhere in Ontario, and it is said in this case that some

of the persons in respect of whom poll tax is claimed in this action have filed such certificates. Under the circumstances we cannot, in my opinion, (at all events upon the facts here presented) order the defendant to pay to the plaintiff poll tax imposed on its employees in such cases, and this opinion is therefore directed only to those instances in which the facts admittedly have been proved, and no such complication arises.

It is to be noted that the obligation imposed on the employer by the section in question is to pay over to the collector, and the collector is not a party to this action. Counsel for the plaintiff asked that if necessary the collector of taxes for the Town of Timmins should be added as a party plaintiff, upon his written consent being filed, and I think this should be done.

I think, therefore, the appeal must be allowed within the limits above noted, and judgment given for the plaintiff accordingly, with costs of the action and of the appeal, upon the appropriate scale.

Appeal allowed with costs.

[COURT OF APPEAL.]

Rex v. Longo.

Criminal Law—Accused charged with separate offences—Separate informations and separate charge sheets prepared—Speedy trial under Part XVIII of The Criminal Code—Power of Court to try separate charges together.

The accused, with five other persons, was tried in County Court Judges Criminal Court under Part XVIII of The Criminal Code on three charges of conspiracy, and the accused was convicted on all three charges.

A separate information had been laid in respect of each charge and a separate charge sheet for each charge was prepared for the purposes of the record at the trial. Each charge was read separately to the accused persons and they individually pleaded not guilty to each of the charges as it was read. It was then agreed by counsel for all parties that all three charges should be tried together and that the evidence adduced should be applicable accordingly to all three charges. The trial proceeded in accordance with this understanding and lasted through several days.

The accused appealed to the Court of Appeal against both conviction and sentence on all three charges.

Held, that there had been no legal and valid conviction or sentence of the accused because, the three charges having been tried together, the whole proceeding was a nullity.

Each charge under Part XVIII of The Criminal Code was equivalent to a separate indictment and it is well settled that two separate indictments cannot be validly tried together, even with the consent of everyone concerned: *Crane v. Director of Public Prosecutions*, [1921] 2 A.C. 299; *Rex v. Dennis*, [1924] 1 K.B. 867; *Rex v. Cassidy* (1927), 61 O.L.R. 362, applied.

Under sec. 856 of The Criminal Code any number of counts may be joined in the one indictment and all the counts may be tried together, although the trial Judge has the discretion to direct a trial upon any one or more of the counts severally. But there is nothing in Part XVIII of The Criminal Code that enables the Judge before whom the accused elects to be tried to join for any purpose a charge contained in one information with a charge contained in another, and the three charges could not properly be regarded as if they were three counts in an indictment so as to make sec. 856 of The Criminal Code applicable to them.

AN appeal by the accused from his conviction and sentence by His Honour Judge Stanbury, sitting in the County Judges Criminal Court for the County of Welland.

April 15th and 16th, 1941. The appeal was heard by ROBERTSON C.J.O., MIDDLETON and HENDERSON JJ.A.

J. R. Cartwright, K.C., and *H. A. Rose*, for the accused, appellant, contended that the trial was a nullity because more than one indictment was tried at the same time: *Rex v. Cassidy* (1927), 61 O.L.R. 362. A simultaneous trial of two indictments is a nullity: *Crane v. Director of Public Prosecutions*, [1921] 2 A.C. 299; *Rex v. Dennis and Parker*, [1924] 1 K.B. 867; *Rex v. McDonnell* (1928), 20 Crim. App. R. 163. *Reg. v. Brett and Parish*

and *Reg. v. White* (1848), 3 Cox C.C. 79, were decisions of a single Judge and have been overruled by the *Crane* case (*supra*).

F. W. Griffiths, K.C., and *W. K. Brown*, K.C., for the Crown, respondent, contended that the trial was not a nullity because the several indictments arose out of the same transaction or series of transactions. Here counsel for the accused consented that all three indictments be tried together, and as Lord Denman said in *Reg. v. Brett and Parish* (1848), 3 Cox C.C. 79, "I see no objection to the jury being charged with both inquiries at the same time, where the parties consent to such a mode of proceeding."

The objection of the appellant is purely technical and it would have been in accordance with the well-recognized practice to include the three charges in one indictment and to proceed to trial of all the charges in that indictment simultaneously.

Cur. adv. vult.

April 29th, 1941. ROBERTSON C.J.O.:—This is an appeal by one Frank Longo from his conviction and sentence by His Honour Judge Stanbury sitting in the County Court Judges Criminal Court for the County of Welland.

The appellant, with five others, was tried on three charges of conspiracy. A separate information was laid in respect of each charge, and a separate charge sheet for each was prepared for the purposes of the record at the trial. In each of the charges the appellant was charged with conspiring between July 1st, 1936 and September 20th, 1940, at various places to commit a certain offence. One charge was of a conspiracy to distill spirits in violation of sec. 164, subsec. (a) of ch. 52 of the Statutes of Canada, 1934, and, amendments thereto, contrary to sec. 573 of The Criminal Code of Canada. Another charged a conspiracy by fraudulent means, namely, the unlawful distillation of spirits to defraud the public, His Majesty's Government of Canada, of \$10,896.00, thereby committing the offence mentioned in sec. 444 of The Criminal Code of Canada and its amendments. The third charge was of a conspiracy to sell, offer for sale, purchase and have in their possession, spirits unlawfully manufactured or imported, without lawful excuse, in violation of sec. 169 of The Excise Act and its amendments.

The persons accused having all elected a speedy trial before the County Judge, and three separate charge sheets being prepared, the accused (six in number) all appeared before the

County Court Judge at Welland, when each charge was read separately to the accused, and they, individually, pleaded not guilty to each of the charges as it was read. It was then agreed by counsel for all parties that all three charges should be tried together, and that the evidence adduced should be applicable accordingly to all three charges. A trial proceeded in accordance with this understanding and lasted through several days. The appellant was convicted, as were some of the others, on the three charges, and was thereupon sentenced. He now appeals as to all three charges against both conviction and sentence.

Upon the opening of the argument of the appeal counsel for the appellant took the point that there had been no legal and valid conviction or sentence of the accused on the ground that by reason of the three separate charges having been tried together the whole proceeding was a nullity. In support of this objection he cited the judgment of this Court in *Rex v. Cassidy* (1927), 61 O.L.R. 362. In that case there were two separate indictments against the one accused, and the accused consented that the evidence concerning both charges be received at the same time. The fact that this had been done was not made a ground of appeal, but an appeal being taken on other grounds, the Court *proprio motu* expressed its disapproval of the practice of trying two indictments at the same time, and said that there was no authority for such a practice. The convictions were accordingly quashed, and new trials, each on a separate indictment, were directed.

After hearing the argument of counsel for the appellant in support of this objection alone, we adjourned the further hearing of the appeal until the next day to afford counsel for the respondent an opportunity to look into the matter, the objection not having been expressly taken in the notice of appeal. On the next day, after hearing counsel both for the respondent and for the appellant upon this objection only, we reserved judgment upon it and directed that the argument of the appeal on other points should stand until we had determined it, giving leave to counsel to supplement their oral arguments with any memoranda they cared to submit.

The substance of the objection taken for the appellant is that The Criminal Code makes no provision for the joint trial under Part XVIII of separate charges, each of which is to be properly considered, for this purpose, as equivalent to a separate indict-

ment, and that when the accused has pleaded not guilty to one such charge, the issue thus joined must be the subject of a separate trial, apart from any other charge.

For the respondent it is argued that the objection is purely technical and there is no merit in it, and that it would be quite proper and in accordance with well recognized practice to include the three charges in question as separate counts in one indictment, and to proceed to trial of all the charges in that indictment simultaneously. No doubt that is so in the case of an indictment, and it is expressly provided for by secs. 856, 857 and 858 of The Criminal Code, subject to the power of the Court in its discretion to direct a separate trial of any one or more of the counts.

It appears to be well settled that two separate indictments cannot be validly tried together, even with the consent of everyone concerned. As was stated in *Rex v. Dennis*, [1924] 1 K.B. 867, by Avory J., "No criminal court has jurisdiction to try two separate indictments at one and the same time, and therefore the consent given to such trial cannot give jurisdiction." It is true that in that case the two indictments that were tried together were against two different accused, but the principle upon which the Court proceeded would seem to be as broad as that stated in the quotation I have made. In the *Dennis* case the Court of Appeal followed the decision in *Rex v. Crane*, [1920] 3 K.B. 236, and of the House of Lords in *Crane v. Director of Criminal Prosecutions*, [1921] 2 A.C. 299.

The respondent cites the cases of *Regina v. Brett* and *Regina v. White* (1848), 3 Cox's C.C. 79. These two cases came before Lord Denman at the Essex Spring Assizes. In each of the cases there were two indictments and different persons were charged by each indictment. It being suggested by counsel for the prosecution in the first-mentioned case that it would be convenient that the two prisoners should be tried together upon the respective indictments, and the counsel who appeared for both prisoners having no objection, Lord Denman said that he could see no objection to the jury being charged with both inquiries at the same time where the parties consented to such a mode of proceeding. The prisoners were accordingly tried together. In the second case the suggestion that the two indictments should be tried at once was made by Lord Denman, and the prisoners consenting, they were so tried.

In the course of argument in the case of *Rex v. Dennis* (*supra*) Mr. Justice Avory said that the judgments in the *Crane* case appeared to show that *Regina v. Brett* cannot now be considered good law. I think the law must be taken to be now well settled as laid down in the case of *Rex v. Cassidy* (*supra*) and as stated by Avory J. in *Rex v. Dennis*. See also *Rex v. McDonnell* (1928), 20 Crim. App. Rep. 163.

Counsel for the Crown submits, however, that what we have here is not to be regarded as if it were the case of three separate indictments tried together, but that it is essentially on the same footing as the trial together of three counts in one indictment. It is not disputed that sec. 856 of The Criminal Code authorizes the joining of any number of counts in the same indictment and all the counts may be tried together, although the trial Judge has a discretion to direct a trial upon any one or more of the counts separately, as provided by secs. 857 and 858.

The question to be considered, therefore, would seem to be whether the three charges involved in this appeal can properly be regarded as if they were three counts in an indictment, so that sec. 856 of The Criminal Code may be applied to them.

In *The King v. Cross* (1909), 14 C.C.C. 171, a decision of the Nova Scotia Court of Appeal, the prisoner had been charged with fraudulently converting certain moneys received by him on terms requiring him to account for and pay the same to another, and elected speedy trial. At the trial counsel for the prisoner having urged that each taking of money was a separate offence, the prosecuting counsel applied for leave to amend by substituting for the one charge that had been laid 62 charges, each of the charges being with respect to an item included in the sum mentioned in the original charge. Apparently the 62 charges were all to be found in the one record upon which the trial proceeded. The prisoner was given his election as to the mode of trial on each of the 62 substituted charges, and elected a speedy trial as to each of them, and the trial then proceeded, not on all the charges at one time, but first on one charge and then on three of the charges together, although counsel for the prisoner objected to the jurisdiction to try more than one charge at a time. On appeal it was held in the Supreme Court of Nova Scotia that each of the charges might be treated as a separate count in an indictment, and that the trial Judge had the power to try together such of the charges as he thought proper. Graham

J. dissented, being of the opinion that there was no analogy to the case of an indictment containing several counts, and that the County Judge could not properly amend to the extent that he did, and that there were in fact 62 records, no two of which could be tried together.

The Nova Scotia case differs from the present case in this, that there the proceeding started from a single information and it was a single offence that was charged when the case came before the County Judge, while here each of the three charges originated in a separate information, and the accused having been committed for trial on each of them, he came before the County Judge on three distinct and separate charges. I find nothing in Part XVIII of The Criminal Code, which provides for the speedy trial of indictable offences, that enables the Judge before whom the accused elects to be tried to join for any purpose the charge contained in one information with the charge contained in another. The procedure on arraignment provided by sec. 827 seems to provide expressly for the prosecuting officer preferring against the prisoner the charge for which he has been committed for trial, with the right to lay any charge founded on the facts or evidence disclosed in the depositions (sec. 827, subsec. 3). It is not suggested that in this case the prosecuting officer did otherwise than simply prefer separately the three charges contained in the three separate informations on which appellant was committed for trial.

After arraignment and a plea of not guilty the trial is to proceed under sec. 833. It contains no provision for the trial of two charges together that, up to that time, have been separate, whether they arise wholly or in part from the same facts, or whether they do not. There is no claim that either sec. 834 which provides for preferring another charge with the consent of the Judge, or sec. 839 which gives the Judge large powers of amendment, was applied in this case.

The record prepared by the prosecuting officer was a separate one for each of the three charges, and they so appear in the appeal book before us. This was no doubt intended for the purposes of the record required by sec. 833, subsec. 3. No different record seems to have existed.

Respondent's counsel submits that as the County Judge had jurisdiction over the accused, and jurisdiction as well to try the offence, what is now objected to was a mere irregularity and did

not make the trial a nullity. The County Judge had, however, no jurisdiction to try the accused and convict him except by due process of law. He could not adopt a new and unauthorized mode of trial even with the consent of the accused, and for a good purpose. Ample authority for that proposition, if any authority is needed, may be found in the *Crane* case already cited, and which is somewhat more fully reported in the House of Lords in 15 Crim. App. R. 183. I have read *Rex v. Simpson*, [1923] 3 W.W.R. 1095; *Rex v. Relf* (1926), 47 C.C.C. 38; *Rex v. Stanyer* (1923), 41 C.C.C. 206; *Rex v. Necumber* (1931), 56 C.C.C. 110, 391. None of these cases is precisely this case, and they show some diversity of opinion as to the powers of the Judge trying a case under Part XVIII. In *Rex v. Simpson* the second charge was added by amendment and the principle applied would cover this case, but it is not necessary here to carry the principle as far as it was carried in that case.

The objection is not necessarily a merely technical one, for in the procedure followed there is no control left in the hands of the trial Judge to be exercised at his discretion during the course of the trial, as provided by sec. 858 in the case of several counts in one indictment. In any event, I think no course is open to us but to allow the appeal and quash the conviction of the appellant on the ground that the trial was a nullity. The appellant must, therefore, be tried again on each of the charges.

MIDDLETON J.A.:—I agree. In *Rex v. Childs*, [1939] O.R. 9, there were two counts each charging guilt as to a different woman. The Court expressed a disagreement with this practice but could not interfere.

HENDERSON J.A. agreed with ROBERTSON C.J.O.

Appeal allowed and conviction quashed on the ground that the trial was a nullity.

[COURT OF APPEAL.]

Mercer et al. v. Gray.

Negligence—Damages—Whether infant between six and seven years of age can be guilty of negligence—Alleged error of treatment by physician attending the infant plaintiff—Effect of alleged error on the quantum of damages—Pleadings—Whether defendant must plead a special issue as to damages.

The question whether an infant between six and seven years of age can or cannot be guilty of negligence is a matter for the jury to determine from the evidence, and it is not the duty of the Court to pass upon the question of the infant's capability so long as the jury is instructed that the same degree of care does not apply in the case of an infant of tender years as in the case of an adult.

In an action for damages for personal injuries, if reasonable care has been used by the plaintiff to employ a competent physician or surgeon to treat personal injuries wrongfully inflicted, the results of the treatment, even though by an error of treatment the treatment is unsuccessful, will be a proper head of damages. There may be cases however where the medical or surgical treatment given the plaintiff is so negligent as to be actionable and as to constitute *novus actus interveniens*.

If a defendant in such an action desires to adduce evidence at the trial for the purpose of establishing that the medical treatment given the plaintiff was negligent, he must in his statement of defence specifically plead error or negligence in the medical treatment.

AN appeal by the plaintiffs from a judgment of Urquhart J. entered on the findings of a jury.

May 7th, 8th and 9th, 1941. The appeal was heard by MIDDLETON, FISHER and McTAGUE JJ.A.

F. J. Hughes, K.C., and W. A. Donohue, for the plaintiffs, appellants, contended that the damages awarded were grossly inadequate and that the learned trial Judge had erred in charging the jury that the infant plaintiff's damages would be greatly decreased "if these things are not caused by the accident, but caused by the doctors".

The infant plaintiff was between six and six and one-half years of age and was too young to be capable of contributory negligence.

The surgical and medical treatment accorded the infant plaintiff was given by a fully qualified and eminent surgeon, and if the treatment was erroneous the plaintiff's damages should not be reduced on this account: *Small v. Westville* (1898), 40 Nova Scotia Reports 226.

The evidence attacking the surgical and medical treatment was improperly admitted by the learned trial Judge since improper treatment of the infant plaintiff had not been pleaded. At the trial counsel for the plaintiffs was taken by surprise and had not asked for leave to call more than three experts.

J. B. Aylesworth, K.C., for the defendant, respondent, contended that there was ample evidence upon which the jury believed that the condition of the infant plaintiff's legs did not arise from the accident. The plaintiff is required to prove that the damages claimed arise from the acts or omissions of the defendant complained of, and on the evidence the damages substantially were not so caused.

There was ample uncontradicted evidence of the capabilities and knowledge of the child upon which the jury properly found that the child did not exercise the degree of care which she was capable of exercising.

Cur. adv. vult.

May 16th, 1941. The judgment of the Court was delivered by McTAGUE J.A.:—This is an appeal from the judgment of Urquhart J., after trial by jury. Since I have reached the conclusion that there must be a new trial, I shall try to refrain from stating any views on the facts that may prove prejudicial on a new trial.

The action is for damages for negligence. The defendant was driving his automobile on Ontario Street in the City of Sarnia and came into collision with the infant Naomi Mercer, who was crossing an intersection, as a result of which she was seriously injured. The jury in answer to questions gave damages to all three plaintiffs. The plaintiffs appeal on the ground that the damages awarded were inadequate by reason of the learned trial Judge's faulty charge to the jury, and also by reason of the admission of evidence not properly admissible. A new trial is asked.

The learned trial Judge put questions to the jury as to whether the infant was guilty of contributory negligence and also as to whether the parents were guilty of contributory negligence. Since neither parent was with the child at the time of the accident it is a little difficult to understand why any question was put as to their negligence. The difficulty becomes only the more apparent when one considers the answers of the jury. In answer to the question regarding the child's negligence the jury said she was negligent in "not taking necessary precautions to observe approaching traffic, as instructed by teacher and parents." In answer to the question as to the negligence of the parents they said the parents were negligent because of "over-confidence of child's intelligence." In the general result the jury found the

defendant liable to the extent of 80 per cent., the child negligent to the extent of 15 per cent., and the parents to the extent of 5 per cent.

Counsel for the respondent conceded that the finding of the jury with respect to the parents' negligence was bad in law. Obviously, both findings being contradictory in nature cannot stand, and counsel wisely disclaims the finding that affected his client's pecuniary interest the greater. In the circumstances of this case both questions should not have been put, but only the one with respect to the child's negligence.

Appellants contend that the finding of the jury with respect to the infant's negligence should not be allowed to stand because the evidence does not support any such finding in fact. In the alternative they argued that the child being of tender years, between six and seven years, could not be capable of negligence in law. On the first proposition there was evidence I think to support the jury's findings, but at any rate the question is clearly one for a jury, and we cannot interfere. The second proposition is a somewhat vexing one. There have been cases like *Bouvier v. Fee*, [1932] S.C.R. 118, and *Acadia Coal Co. v. McNeill*, [1927] S.C.R. 497, where it seems to have been suggested that there should be a dividing line about the age of seven as in the criminal law. Generally speaking, however, the weight of authority in England rather supports the view that in each case it is a matter for the jury from the evidence and not the Court to pass upon the question of capability, so long as the jury is instructed that the same degree of care does not apply in the case of an infant of tender years as in the case of an adult. The learned trial Judge took this view and so charged the jury. I am unable to see that the charge on this branch is open to criticism.

The main difficulty in the case results from the evidence tendered by the defendant in respect to the amount of damages for which the defendant was liable. The child, as I have already intimated, was very seriously injured. The family physician was called in and he in turn called in a surgical specialist. No direct attack was made on the qualifications or general good repute of the medical men employed. From the evidence their general qualifications appear to be excellent. The child's both legs were fractured. Reductions under a fluoroscope were done in the recognized manner and the legs put in a cast. As sometimes happens, not always, swelling under the cast took place

and the condition became much aggravated. Defendant introduced evidence to show that the doctors had not cut the cast early enough once a cyanosed condition became evident, and that therefore a great part of the damage resulted from the lack of skill or negligence in treatment and that for that part the defendant could not be liable.

The case went to the jury on that simple basis, and judging from the amount of damages awarded, particularly in respect of the father's out-of-pocket expenses, the jury gave strong effect to defendant's contention.

With all due respect to the learned trial Judge, I am of opinion that the matter is not so simple. Even if in the circumstances here the evidence were admissible at all the matter should have gone to the jury in a completely different way.

It seems to me that if reasonable care is used to employ a competent physician or surgeon to treat personal injuries wrongfully inflicted, the results of the treatment, even though by an error of treatment the treatment is unsuccessful, will be a proper head of damages. As Gahan in *Law of Damages*, at p. 141, points out, this principle always seems to have been conceded in England without argument. This also appears to be the case in Ontario. In Nova Scotia it was adopted in *Small v. Westville* (1898), 40 N.S.R. 226. Examples of adoption of the same principle in the United States are *Ryder v. Findley*, 195 N.Y.A.D.R. 731; *Reed v. Detroit*, 68 Michigan Reports, and *Pullman Palace Car Co. v. Bluhm*, 109 Illinois Reports, p. 20.

In Beven on Negligence, 4th edition, it is dealt with in the following terms, at p. 104:

"It follows from what has been said that an injured person is not bound to employ the most skilful surgeon who can be found, nor yet to incur lavish expenditure of any kind in the treatment of the injuries he has sustained. If his medical man treats him erroneously, no claim to exoneration of the wrongdoer from full liability is thereby established, if only the medical man employed is of good standing and repute."

In Denton on Municipal Negligence, at p. 360, it is put:

"Where the damages are increased owing to the physician's negligence, it is difficult to see why such negligence should be attributed to the plaintiff so long as there is no negligence on the plaintiff's part in the selection of his physician. The negligence of another person co-operating with the municipality

in producing the injury in the first instance would not relieve the corporation from the consequences of its neglect so there is no reason why the subsequent negligence of a third person increasing the injury should tend to relieve the municipality. A plaintiff is bound to act in good faith and to resort to such reasonable means and methods within his reach as will make his damages as small as he can, and so long as he does this, if the injuries are enhanced by the negligence of a physician, the plaintiff is not disentitled to recover the whole damage."

In general the above, I think, may be taken as the correct general principle, although I am inclined to think that perhaps it may be a little too broadly stated by Judge Denton. There may be cases where the medical or surgical treatment is so negligent as to be actionable. This would be in effect *novus actus interveniens* and the plaintiff would have his remedy against the physician or surgeon. But this the defendant would have to prove in the proper forum, and as in Ontario the proper forum for actions of malpractice is a Judge without a jury, if such a defence were set up there would be ample reason for dispensing with a jury. At any rate no proper instruction as to law on this subject was given to the jury, and a new trial must be had.

This brings me to the matter of pleading. In the statement of claim the usual claim for damages was made. In the statement of defence the issue of damages was simply traversed, the defendant merely putting the plaintiff to strict proof of the damages. Quite evidently at the trial plaintiff's counsel was completely caught by surprise by the attack made on the surgical treatment. His case was prepared in the usual way but without regard to having to defend the particular phase of the treatment complained of. Quite naturally he made no application for calling additional expert evidence at the beginning of the trial. From the pleading there was no reason to suspect the attack that was made.

On the appeal Mr. Aylesworth took the position that there is no necessity for a defendant proposing to set up a special issue on the matter of damages to so plead. I am unable to agree. That appears to be the law in England under Order 21, rule 4, summarized in Bullen and Leake's *Precedents of Pleading*, 7th edition, at p. 931, as follows:

"No denial or defence shall be necessary as to damages claimed or their amount; but they shall be deemed to be in issue, unless expressly admitted."

In Ontario, however, there is no such rule. It seems to me that the general principle should apply and that a party should not be allowed to offer evidence on an issue not specifically pleaded if the result is to take the other party by surprise. For this reason I think the evidence on the matter of error or negligence in the medical treatment on the pleadings as they stood should not have been admitted.

In the result the appeal should be allowed and a new trial ordered. The defendant may amend his statement of defence, if so advised. The costs of the abortive trial should be left to the discretion of the Judge conducting the new trial. The plaintiffs should have the costs of this appeal.

Appeal allowed and new trial ordered.

[COURT OF APPEAL.]

Healy v. Runnymede Iron and Steel Co. et al.

Negligence—Practice—Third parties—The Negligence Act, R.S.O. 1937, ch. 115, secs. 2(1) and 5—The Workmen's Compensation Act, R.S.O. 1937, ch. 204, sec. 14(1).

On an application made in Chambers under sec. 5 of The Negligence Act, R.S.O. 1937, ch. 115, as amended by 1939, Geo. VI, ch. 47, sec. 23, to add a person as a third party to the action it is not necessary for the applicant to show that the party sought to be added is unquestionably liable because that cannot be determined until the trial; the order adding a third party in Chambers should be made if it is shown that the person sought to be made a third party "is or may be wholly or partly responsible for the damages claimed".

A motion by the defendants for an order adding The Bell Telephone Co. of Canada as a party defendant.

The motion was heard by THE MASTER (F. H. Barlow, K.C.), in Chambers at Toronto.

R. R. McMurtry, for the defendants.

D. T. Symons, K.C., for The Bell Telephone Co. of Canada.

J. R. Cartwright, K.C., for the plaintiff.

April 9th, 1941. THE MASTER:—This is an application by the defendants for an order under The Negligence Act, R.S.O. 1937, ch. 115, adding The Bell Telephone Company of Canada as a party defendant.

The late Thomas Oswald Healy, at the time of the accident which caused his death, was an employee of The Bell Telephone Company of Canada. The defendant company was the owner of a motor vehicle driven by the defendant Hobbs on which vehicle was a derrick to which was attached a telescopic boom. The Bell Telephone Company of Canada maintained a wire stretched from a pole on one side of Market Street to a pole on the opposite side. The late Thomas Oswald Healy had just climbed one of the poles when the boom of the motor vehicle in question caught the wire causing injuries resulting in his death. It is alleged that the telephone company was negligent in that it did not maintain the wire at a proper height from the street and that, if it had been so maintained, no accident would have happened.

The plaintiff has brought her action under The Fatal Accidents Act against the owner of the motor vehicle and the driver thereof. The latter now moves to add The Bell Telephone Company of Canada as a party defendant. The Bell Telephone Com-

pany objects to be added on the ground that it comes within sec. 14 of The Workmen's Compensation Act, R.S.O. 1937, ch. 204. The plaintiff also objects to the adding of The Bell Telephone Company of Canada as a party defendant on the ground that there is no liability of the employer The Bell Telephone Company of Canada to the estate of the deceased employee Thomas Oswald Healy. Counsel for the defendants admits that the plaintiff has no right of action against the telephone company but contends that the defendants are entitled to have The Bell Telephone Company added in order that they may be before the Court for the purpose of determining the responsibility for the accident.

The plaintiff is *dominus litis* and should have some choice as to whom she wishes to sue. The real test, however, is, in my opinion, not responsibility for the accident but liability, and, unless it can be shown that there may be some liability to the plaintiff on the part of the party sought to be added, such party ought not to be added. Any liability or right of action of the plaintiff as against the telephone company is completely taken away by sec. 14 of The Workmen's Compensation Act.

Counsel for the defendants contends that this matter should not be decided on a summary application and that The Bell Telephone Company of Canada should be made a party as a matter of course. It is true that there are certain cases where the plaintiff does not wish to make any claim against the party sought to be added but in every instance a *prima facie* case of liability or partial liability to the plaintiff has been shown. In this case The Workmen's Compensation Act takes away all right of action and it is thus a matter that should be decided now: *Wilson v. Hamilton Hydro-Electric Commission* (1931), 40 O.W.N. 545, is a case in point. See also *Lattimer v. Heaps* (1931), 40 O.W.N. 580; *Dominion Cannery v. Costanza*, [1923] S.C.R. 46, at p. 61; *Lecompte v. Bell Telephone Co.* (1931), 66 O.L.R. 580; *Cameron v. Murray*, [1931] O.R. 83.

For the above reasons the motion will be dismissed with costs.

The defendants appealed from the order of the Master.

The appeal was heard by J. G. KELLY J. in Chambers at Toronto.

R. R. McMurtry, and *E. L. Haines*, for the defendants, appellants.

A. C. Heighington, K.C., for The Bell Telephone Co. of Canada, respondent.

J. R. Cartwright, K.C., and *G. D. Watson*, for the plaintiff, respondent.

April 25th, 1941. J. G. KELLY J. (at the conclusion of the argument):—This motion comes by way of an appeal from the Master who dismissed an application by defendants to add The Bell Telephone Company as another defendant under the provisions of sec. 5 of The Negligence Act, R.S.O. 1937, ch. 115. Subsequently the notice of motion was amended to ask that the new party be added as a third party pursuant to the same section of the Act.

The action is by the administratrix of the estate of Thomas Healy, who was a servant of The Bell Telephone Company, and was killed in an accident while engaged in the service of his master. The accident occurred in this way. One of the defendants was driving a car owned by the other defendant, and from this car projected a boom which became entangled in an overhead wire and pulled a pole, upon which the deceased man Healy was working, to the ground. Healy was killed in the fall.

The defendants seek to add The Bell Telephone Company because they say that the telephone company was by law required to keep its wires at a certain minimum height above the ground, but failed to do so, and that this failure was a cause—either the sole cause or a contributing cause—to the accident and death of Healy.

So far as The Bell Telephone Company and the plaintiff are concerned, the accident comes within the provisions of The Workmen's Compensation Act, R.S.O. 1937, ch. 204, and sec. 14 of that Act takes away any right of action which the plaintiff might otherwise have because of Healy's death against Healy's employer.

The Master has held that because, by reason of sec. 14 of The Workmen's Compensation Act, the plaintiff has no right of action against The Bell Telephone Company, The Bell Telephone Company cannot be added as a defendant in the action. Whether the Master would have held that The Bell Telephone Company could not be added as a third party does not appear from his reasons.

The question is a difficult one and one I think that should not be decided in Chambers. The Master in effect was determining

the whole rights of litigants in holding that the defendants to the action had no cause of action against The Bell Telephone Company. It may be that, in the form that the motion came to him, he would have to decide that question, but the decision of such a question in Chambers is, if possible, to be avoided. The matter, I may say, is not free from doubt in my mind, but it has been argued at length and I do not think that anything would be gained by reserving the matter for further consideration.

If we disregard, for the moment, The Workmen's Compensation Act and look at The Negligence Act, the situation is this. The deceased Healy was killed as the result of an accident which may have been caused by the negligence of the two defendants and the negligence of The Bell Telephone Company. The plaintiff, as a result of that, would have a right of action against the two defendants and The Bell Telephone Company at common law, and by sec. 2 of The Negligence Act the present defendants would have a right to claim against The Bell Telephone Company, that being a right created by The Negligence Act.

Turning then to sec. 14 of The Workmen's Compensation Act, we find that it takes away certain rights of action. These rights of action so taken away are such rights as the deceased man Healy, or his representative in the fatal accident action, would have against Healy's employer. Nothing more is taken away and if, apart from The Workmen's Compensation Act, there would be a right to have the question of liability determined between the present defendants in the action and The Bell Telephone Company, that right is not taken away, at any rate expressly, by sec. 14 of The Workmen's Compensation Act.

There are difficulties in the wording of these sections of The Negligence Act, but to deny the defendants any right of action against The Bell Telephone Company, on the simple ground that the deceased was an employee of The Bell Telephone Company, would be to determine finally against these defendants an important question of liability, and to determine it merely on the ground of the relationship existing between the deceased Healy and The Bell Telephone Company, a ground having nothing to do with negligence. I am unwilling to do so without the very clearest and most compelling wording of the Statute, and I cannot find such clear and compelling words as in my opinion would justify me in making such a decision under the circumstances here.

I think it advisable to say one further word about the practice. In my opinion it would be more desirable if a defendant who wishes to add a third party under The Negligence Act, sec. 5, were to issue and serve his third party notice without asking for leave. If the third party in due course thinks that no cause of action against him is made out in the pleading, that question may be tested in Court, either by a motion under Rule 124, or by the third party's raising it by pleading an objection in point of law. It seems to me most undesirable to have a highly difficult question of law, which goes to the ultimate rights of litigants, decided on a motion in the Master's Office.

Section 5 of The Negligence Act provides that a person who may be responsible for the damages claimed may be added as a third party. I decide nothing more than this, that The Bell Telephone Company may be responsible. After pleadings are delivered, the ultimate substantive rights of the parties, with which I do not now deal, may be decided in Court, on motion or after trial as the case may be.

I think there should be an order that The Bell Telephone Company be added as a third party and that the defendants may serve a third party notice upon that company. Any costs caused to the plaintiff by reason of the addition of the third party, together with the costs of the motion before the Master and here, should be recoverable by the plaintiff against the defendants in any event, who, if the Judge who finally determines the rights of the parties so decides, may have these costs against the third party.

Pursuant to leave granted by Chevrier J., The Bell Telephone Company of Canada appealed to the Court of Appeal from the order of J. G. Kelly J.

May 13th, 1941. The appeal was heard by MIDDLETON, MASTEN and McTAGUE JJ.A.

A. C. Heighington, K.C., and *D. M. Symons*, for The Bell Telephone Company of Canada, appellant.

J. R. Cartwright, K.C., and *G. D. Watson*, for the plaintiff.

R. R. McMurtry, for the defendants, respondents.

May 17th, 1941. MIDDLETON J.A.:—An appeal by The Bell Telephone Company of Canada from the order of the Honourable Mr. Justice Kelly dated the 25th April, 1941, adding The Bell Telephone Company of Canada as a third party to this action

pursuant to The Negligence Act, R.S.O. 1937, ch. 115, and the amendments thereto.

The action is brought by Mrs. Healy as administratrix of the late Thomas Oswald Healy by reason of his death while employed by The Bell Telephone Company as a workman. The Runnymede Iron and Steel Company carries on business in the City of Toronto and the defendant Hobbs was employed by them. The deceased Healy was employed as a lineman by The Bell Telephone Company and was erecting a line. The Runnymede Iron and Steel Company in operating a truck along the street, upon which there was an erection sufficiently high to interfere with the line being placed by Healy, came in contact with the line and Healy was thrown to the ground and killed. Healy's administratrix has claimed to recover damages from the defendants and has made a claim against The Bell Telephone Company under The Workmen's Compensation Act which has not been adjudicated by the Board. She brings this action as administratrix for the benefit of herself and her infant children against the defendants claiming that it was negligent to operate a motor vehicle with a telescopic boom on the rear end thereof in such a way as to become entangled with the wire, as the result of which the deceased was thrown to the ground and killed. The administratrix claims \$35,000.00 damages for the death of Healy.

The defendant originally moved before the Master in Chambers to add The Bell Telephone Company as party defendant. This motion failed because the plaintiff had made no claim against The Bell Telephone Company in this action, although she had filed a claim against that company under The Workmen's Compensation Act. The Master's order is not now in question.

Upon appeal being had from it returnable before the Honourable Mr. Justice Kelly a supplementary notice was served asking that The Bell Telephone Company should be added as a third party in this action, and that motion was dealt with by Mr. Justice Kelly. He made the order now in review and added The Bell Telephone Company as a third party, and directed that a third party notice do issue and be served upon The Bell Telephone Company, and that the adding of The Bell Telephone Company as a third party shall be without prejudice to the right of all parties to raise objection thereto as a point of law upon the pleadings or at the trial.

Mr. Justice Kelly's judgment recognizes the principle that this motion was procedure and procedure only, and that it would not be proper for him to entertain a complicated and difficult question of law in Chambers. The right to appeal from his decision to this Court is subject to the provisions relating to interlocutory appeals. When the parties get before this Court there is no further effective right of appeal because the Supreme Court has wisely laid down the rule that an appeal is to be from the judgment of this Court upon the merits and not upon interlocutory applications.

I quite agree with what was done by Mr. Justice Kelly for the reason that the important question of law arising ought to be subject to unrestrained and unrestricted right of appeal to the Supreme Court or the Privy Council as the case might be.

The appeal from Mr. Justice Kelly's order is brought by The Bell Telephone Company, the plaintiff also joining in the appeal and supporting it. The appeal is by leave of the Honourable Mr. Justice Chevrier. Mr. Justice Chevrier gave no written reasons, but his order recites that, it appearing that there are conflicting decisions upon the matter involved in the proposed appeal, it is desirable that leave be granted.

The statute under which the appeal is brought was amended in 1939 by ch. 47, sec. 23, and it now reads:

"5. Whenever it appears that any person not already a party to an action is or may be wholly or partly responsible for the damages claimed, such person may be added as a party defendant or may be made a third party to the action upon such terms as may be deemed just."

According to the construction which I have placed upon this statute all that is necessary before an order can be made adding a third party, is that it should appear *not* that the party sought to be added is unquestionably liable (that cannot be determined until the trial) but that it should be shown that the person sought to be added "is or may be wholly or partly responsible". The arguments addressed to us here appear formidable, but it cannot be said that the defendants are so clearly entitled to no remedy against The Bell Telephone Company as to bring it altogether outside of the statute. The arguments may be well founded and The Bell Telephone Company may not be responsible, but on the other hand that it is a matter which cannot be determined in Chambers and which Mr. Justice Kelly rightly

refused to try to determine in Chambers, leaving the party sought to be made liable to the remedy pointed out by the rule. If as the result of this litigation or in other litigation it is held by the Court of ultimate resort that there is no liability on the part of the tort-feasor, who is also a master, then it would so declare it, and no doubt obedience will be yielded by the Court to any such finding.

For the reasons suggested by Mr. Justice Kelly I think the appeal should be dismissed with costs payable by The Bell Telephone Company to the defendants in any event of the action. The plaintiff is a necessary party to this motion and she may have her costs as costs in the cause.

MCTAGUE J.A. agreed with MIDDLETON J.A.

MASTEN J.A. (dissenting):—This is an appeal by The Bell Telephone Company of Canada, pursuant to leave granted by Chevrier J., from the order of Kelly J., dated the 25th April, 1941, allowing an appeal from the order of the Master. The order of Kelly J., against which this appeal is brought, after allowing the appeal from the order of the Master, directed that The Bell Telephone Company “should be and it was thereby made a third party to this action”; and it was further ordered that the defendants should issue a third party notice and serve the same on The Bell Telephone Company of Canada, and that the “adding of The Bell Telephone Company of Canada as a third party to this action shall be without prejudice to its right to raise objection thereto as a point of law in pleadings or at trial”. No direction was given by the order as to the method of trial, or as to the right of the third party to intervene at the trial, or as to pleadings to be delivered or otherwise respecting the further proceedings in the action.

The present action is brought under Lord Campbell's Act by the executrix and widow of one Healy, who is alleged to have been killed through the negligence of the defendant, Alfred W. Hobbs, a servant of the Runnymede Iron & Steel Co., when acting in the scope of his employment. Healy was an employee of The Bell Telephone Company and claim has been made under The Workmen's Compensation Act in consequence of his death. The respondents seek to add the appellant, The Bell Telephone Company, as a third party in the present action, alleging that they are entitled to contribution or indemnity in whole or in part from

the appellant in respect to any judgment for damages which may be recovered against them by the plaintiff. The plaintiff has not brought any action against The Bell Telephone Company, and indeed is precluded from so doing by sec. 14, subsec. 1 of The Workmen's Compensation Act, R.S.O. 1937, ch. 204, which reads as follows:

"The provisions of this Part shall be in lieu of all rights and rights of action, statutory or otherwise, to which a workman or his dependants are or may be entitled against the employer of such workman for or by reason of any accident happening to him on or after the 1st day of January, 1915, while in the employment of such employer, and no action in respect thereof shall lie."

The contention which was principally urged by counsel for the appellant is that the third party procedure provided by The Judicature Act is not available and cannot be applied where the plaintiff is precluded from suing the person sought to be brought in as a third party.

The respondent and the Judge in the Court below based the order in question on the provisions of The Negligence Act as it stood on the 3rd of October, 1940, the date of the accident in question. These sections of The Negligence Act so relied upon read as follows:

"2. (1) Where damages have been caused or contributed to by the fault or neglect of two or more persons the court shall determine the degree in which each of such persons is at fault or negligent, and, except as provided by subsections 2 and 3, where two or more persons are found at fault or negligent, they shall be jointly and severally liable to the person suffering loss or damage for such fault or negligence, but as between themselves, in the absence of any contract express or implied, each shall be liable to make contribution and indemnify each other in the degree in which they are respectively found to be at fault or negligent."

"5. Whenever it appears that any person not already a party to an action is or may be wholly or partly responsible for the *damages claimed*, such person may be added as a party defendant or may be made a third party to the action upon such terms as may be deemed just."

The cases cited by the respondent in answer do not, in my opinion, apply to the peculiar circumstances of the present case.

In *Lang v. Hooey*, [1932] O.R. 363, at p. 367, the action was, as stated by Magee J.A., for injuries sustained by the plaintiff from an automobile owned by the defendant Huston and negligently driven by Hooey, who was using it with Huston's permission and under his directions and instructions, on the business of the company (which was the party sought to be added), for which Hooey and Huston were sales agents selling the company's washing machine. It is plain that the Court had jurisdiction, on proper evidence, to find the company jointly and severally responsible for damages caused or contributed to by any fault or neglect, for which the company sought to be added was liable as master of its salesman acting within the scope of his employment.

In *Sauriol v. Summers*, [1939] O.R. 253, the question arose in an action for damages in an automobile collision involving three parties. The plaintiff settled with one of the parties for \$8,000.00, and gave it a release, with respect to which Gillanders J.A., makes the following observation, at p. 254:

"On the hearing of the appeal the alleged release was not admitted by counsel for the third party who contended there was no proof before this Court that a binding settlement had been made between the plaintiff and the third party. If there is any question about this it should not be determined on this application."

The accident occurred on April 1st, 1937, and a third party notice was issued on September 20th, 1938, more than a year after the accident. The conflicting contentions are very clearly stated by Gillanders J.A. at p. 255, where he says:

"As pointed out by my Lord Mr. Justice Riddell in his judgment, the right to contribution given in the section is a statutory right created by the Act which was not available at common law. This Act provides (sec. 5) that: 'Whenever it appears that any person not already a party to an action is or may be wholly or partly responsible for the damages claimed, such person may be added as a party defendant upon such terms as may be deemed just.' This course was not open to the defendant in this case by reason of the fact that the period of limitation had expired before he had an opportunity of making such application, and he relies on the provisions of Rule 165(1) which provides in effect that where a defendant claims to be entitled to a contribution against any person not a party to the action he may issue a third party notice.

"To my mind the question raised is one of some difficulty and is not entirely free from doubt. If the plaintiff has settled with the third party and taken a complete release, he has, from the date of such release, no further claim against the third party, and the third party could not be found liable to the plaintiff. On the other hand, if the defendant had in law a right to claim contribution in respect of any damages for which he might be found liable, it is forcibly argued that nothing done between the plaintiff and the third party to which he was not privy should deprive him of such right."

Later in his judgment, when discussing the case of *Wilson v. Hamilton* (1931), 40 O.W.N. 545, he says, at p. 257:

"It should be borne in mind that in this case in view of the provisions of The Workmen's Compensation Act there never could have been any liability by the third party to the plaintiff, while in the case at bar the plaintiff could have brought action against both the defendant and the third party and it is possible both might have been found jointly and severally liable."

I think that the words of the statute as above quoted, contemplate that the Court should, as a condition precedent to decreeing contribution or indemnity between the parties, determine the total damages suffered by the plaintiff, as is pointed out by Gillanders J.A. at p. 259. In other words, as put by Riddell J.A. at p. 261, in his dissenting judgment:

"It is the finding of the Court that is binding according to the statute. . . . Then the statute provides that where 'two or more persons are found at fault or negligent . . . as between themselves . . . each shall be liable to make contribution and indemnify each other in the degree in which they are respectively found to be at fault or negligent'. They are so 'found' by the Court; and until they are so 'found', there is no obligation on them toward their co-tort-feasor; they owe no duty to him unless and until the Court has determined the relative degree of their wrongdoing. This has not yet been done, and there is no duty cast upon this third party to contribute anything to the defendant.

"There has not yet been so much as a determination of negligence on anyone's part.

"If and when there is an adjudication of negligence against the defendant, he may then bring an action against the third party for a declaration that it is one of the 'two or more persons'

at fault, a determination of the relative degree of delict and an order that he receives a contribution from it to be determined by the relative degree of wrongdoing; but at the present time and at the time of the issue of the third party notice, no obligation existed."

But in the present case the Court is precluded by The Workmen's Compensation Act from making any finding respecting the liability of The Bell Telephone Company, so that, as pointed out by Riddell J.A., the jurisdiction to apportion the total damages cannot arise in this action.

In the *Sauriol* case the sum paid by the truck company had been settled at \$8,000.00, and it only remained to ascertain the damages payable by the defendant and add them to the \$8,000.00, but here the damages payable by The Bell Telephone Company have not been ascertained and can only be fixed by The Workmen's Compensation Board.

After all, the defendant is not deprived of any substantive right if this appeal is allowed and the third party procedure struck out. If he has a right to contribution it is not in jeopardy. The appellant is willing to take the risk of letting him contest the plaintiff's claim unaided by the appellant, and if judgment goes against defendant his right to contribution—an independent and separate right given by the statute—is unimpaired, for he can sue as soon as the plaintiff's total damages are ascertained, but not before.

Upon the best consideration that I have been able to give to the matter I am of the opinion that sec. 14(1) of The Workmen's Compensation Act, quoted above, deprives this Court of any jurisdiction to declare The Bell Telephone Company to be jointly and severally liable to the plaintiff, and that by implication the jurisdiction of this Court under sec. 2 of The Negligence Act, quoted above, is wholly excluded from operation in the circumstances here existing.

I am also of opinion that difficulty and confusion in the minds of the jury might well arise from bringing the appellant into the trial, unless, as I would hope, the trial Judge postpones the consideration of all questions affecting appellant until after the plaintiff's claim against the Runnymede Company is determined.

Apart, however, from these considerations, I am of opinion that sec. 5 quoted above, applies only to the "damages claimed",

and that here the only damages claimed are those claimed by the plaintiff against the Runnymede Company is determined.

Apart, however, from these considerations, I am of opinion that sec. 5, quoted above, applies only to the "damages claimed", and that here the only damages claimed are those claimed by the plaintiff against the Runnymede Company.

On these grounds and quite apart from the decisions which were quoted by counsel on behalf of the appellant, I am of opinion that the appeal should be allowed, and that no action for contribution or indemnity can be brought by the defendant, unless or until a recovery has been had against them by the plaintiff.

I would allow the appeal with costs here and below.

Appeal dismissed with costs, MASTEN J.A. dissenting.

[COURT OF APPEAL.]

Foster v. The Prudential Insurance Company of America.

Practice—Juries—Motion to strike out jury notice—Claim by widow of insured on policy of life insurance—Duty of Judge in Chambers under Rule 398—Cause over which Court of Chancery has exclusive jurisdiction—The Judicature Act, R.S.O. 1937, ch. 100, sec. 55(4).

An action by a preferred beneficiary on a policy of life insurance is a cause over the subject of which before The Administration of Justice Act, 1873, the Court of Chancery had exclusive jurisdiction, and therefore by sec. 55(4) of The Judicature Act, R.S.O. 1937, ch. 100, a jury notice cannot be served and filed in such an action. Moreover, apart from the provisions of sec. 55(4) of The Judicature Act such an action is not of a class which should be tried with a jury.

On an application in Chambers under Rule 398 for an order striking out a jury notice, it is the duty of the Judge in Chambers who hears the application to decide whether the case should or should not be tried by a jury: *Wise v. Canadian Bank of Commerce* (1922), 52 O.L.R. 342, applied.

A MOTION by the defendant for an order striking out a jury notice served and filed by the plaintiff.

The motion was heard by URQUHART J. in Chambers at Toronto.

Evan Gray, K.C., for the defendant.

G. T. Walsh, K.C., for the plaintiff.

April 5th, 1941. URQUHART J.:—Application to strike out jury notice in an action upon an insurance policy.

My view of the matter is that on an application of this sort in Chambers the jury notice should not be struck out unless it is

obvious that the trial Judge would surely strike out the jury notice if it were left to him at the trial.

In this case it appears to me that the issues herein can and should be tried by a jury and that proper questions submitted to the jury would make these clear.

The motion will be dismissed (subject to the discretion of the trial Judge if he should think that it is not a case for a jury); costs to the plaintiff in the cause.

The defendant moved for leave to appeal to the Court of Appeal from the order of Urquhart J.

The motion was heard by J. G. KELLY J. in Chambers at Toronto.

Evan Gray, K.C., for the defendant.

G. T. Walsh, K.C., for the plaintiff.

June 4th, 1941. J. G. KELLY J.:—This is an application by the defendant for leave to appeal from the refusal of Urquhart J., subject to the discretion of the trial Judge, to strike out a jury notice. Upon a ground which was not advanced before Urquhart J., but raised by the defendant for the first time before me, I think leave to appeal should be given. The Court of Appeal will, of course, consider all grounds that may be advanced. I deal only with this new ground, upon which my decision to grant leave to appeal is based.

In this action the plaintiff sues in her own name, as a preferred beneficiary, to recover the amount of several policies of insurance, less certain payments made, issued by the defendant company on the life of her husband, now deceased. The plaintiff has served a jury notice.

The right to a jury at present depends upon the provisions of The Judicature Act, R.S.O. 1937, ch. 100. The effect of secs. 54 and 55 of that Act seems to be that a litigant has no right to serve a jury notice in "causes, matters or issues over the subject matter of which before The Administration of Justice Act (1873), 36 Vict. ch. 8, the Court of Chancery had exclusive jurisdiction." The defendant contends that this action is of such a nature that, before 1873, it could be tried only in the Court of Chancery and that there is therefore no right to have it tried by a jury. This raises a question which, it seems to me, should be determined, if possible, before trial. The answer does not depend upon any matter of expedience or convenience.

The argument of the defendant runs as follows: The plaintiff is suing on a contract to which she was not a party. It is a contract for her benefit made between her late husband and the defendant company. At common law, apart from statute, she could never sue on such a contract. In equity, if the contract could be construed as one creating a trust in her favour, she might sue to recover the trust property to which she was entitled. Section 156 of The Insurance Act, R.S.O. 1937, ch. 256, expressly declares that by a policy of life insurance payable to a preferred beneficiary a trust is created in favour of such beneficiary. The defendant argues that prior to The Administration of Justice Act, 1873, trusts were enforced or administered exclusively in the Court of Chancery, and contends that the nature of the action has not changed and that, in such an action now, there is no right to serve a jury notice.

It is perhaps trite law that only in equity can a person enforce a contract, to which he is not a party, made between others for his benefit; see Anson's Law of Contract, 17th ed., pp. 275 and 280; Leake on Contracts, 8th ed., pp. 306 and 308. It is equally clear, from sec. 156 of The Insurance Act, that a preferred beneficiary's right to the proceeds of the life policy in which he is so designated is a right to a trust fund: see *National Life Insurance Co. v. McCoubrey*, [1926] 2 D.L.R. 550.

In England, prior to The Judicature Act, the Court of Chancery appears to have exercised an exclusive jurisdiction over all matters relating to trusts and, it is said, the Common Law Courts persistently refused to recognize as actionable any breach of trust: see Lewin on Trusts, 14th ed., at p. 13; Snell's Principles of Equity, 21st ed., pp. 65 and 66. In Ontario, the Court of Chancery had jurisdiction over all matters relating to trusts and, generally, exercised the same jurisdiction as that exercised by the Court of Chancery in England; see Court of Chancery Act, C.S.U.C., 1859, ch. 12, sec. 26.

The Administration of Justice Act, 1873, sec. 2, gave the right to bring an action in a Common Law Court on a purely money demand although the plaintiff's right to recover was equitable only. This right, at any rate outside a County Court, does not appear to have previously existed. By secs. 124 and 126 of The Common Law Procedure Act, C.S.U.C. 1859, ch. 22, equitable pleas had been permitted in defence or reply, but no

action based on equitable grounds could previously have been brought in any Superior Court of Common Law.

Prior to 1873, the matter of insurance placed by a man on his life for the benefit of his wife had been dealt with by statute. In 1872, an Act entitled An Act to extend the rights of property of married women (35 Vict. ch. 16) by sec. 4, declared such insurance to be a trust for the wife's benefit. Upon the death of the insured, his executor was empowered to give a discharge for the insurance money. If no executor had been appointed by will, the wife herself might apply to the Court of Chancery to have a trustee appointed. Such trustee, when appointed, could give an effectual discharge for the insurance money. The provisions of this enactment were continued past the revision of 1877, but it is not necessary to trace its subsequent history. The important thing is that under this statute at the date of the passing of the Administration of Justice Act, 1873, a wife could not herself give an effectual discharge for moneys payable for her benefit under a policy of insurance on her husband's life and, if an application to Court was necessary, she applied to the Court of Chancery.

Side by side with the Act relating to married women just referred to there existed an earlier statute entitled "An Act to Secure to Wives and Children the benefit of Assurances on the lives of their Husbands and Parents" (1865), 28-29 Vict. ch. 17. This Act authorized men to insure their lives for the benefit of their wives and children, and declared that, upon the death of the person insured, the money due upon a policy should be payable according to its terms free from the claims of creditors. Nothing is said in the statute to indicate the Court in which an action to recover the insurance money had to be brought. Apparently this statute was not regarded as laying down any different rule or principle from that in 35 Vict. ch. 17, sec. 4 (*supra*) because the two remained on the statute books together for many years and, in 1873, by 36 Vict. ch. 19, amendments were made to both statutes.

Counsel referred me to *National Life Assurance Company v. Egan* (1873), 20 Grant 469, a case in which an insurer obtained an injunction in Chancery to restrain an action at law for moneys said to be payable on a policy of life insurance. The ground of the decision was convenience and the case proceeded on the basis that there was concurrent jurisdiction in the Court of Chancery

and the Courts of Common Law. I sent for and have examined the original papers in that suit. The bill in Chancery was to set aside an insurance policy and to restrain an action at law. The defendant in the Chancery suit was the plaintiff in the common law action. He was the brother of the insured and had himself, along with his brother, signed the application for insurance. He was therefore a party to the contract and as such had an action at law without doubt. In the Chancery suit no question of lack of consideration or lack of insurable interest was raised between the parties, and complete particulars of the contract do not appear among the original papers. The result of the litigation was that the policy was set aside because induced by misrepresentation, and the amount of the premiums ordered repaid less costs of suit to the defendant. When examined, therefore, the case adds nothing helpful to the present investigation.

I should point out that, from 1903 to 1924, any person entitled as beneficiary under a contract of life insurance had a statutory right to sue for the insurance money in his own name. In 1903, sec. 80 of The Insurance Act, R.S.O. 1897, ch. 203, was amended by 3 Edw. VII, ch. 15, sec. 3, to give that right expressly. The right was carried into the revision of 1914, R.S.O. ch. 183, sec. 89. In 1924, when the Act in its present form was passed (14 Geo. V, ch. 50, sec. 275), the provision giving an express right of action to a beneficiary was dropped.

The situation at present appears to be this: The plaintiff in this action, being a preferred beneficiary named in the policies on which she sues, has an undoubted right to bring this action in her own name, not because an express right of action is given to her by statute, but because she is the beneficiary of an express trust. In this action she seeks to recover a trust fund. There appears to be good reason to doubt whether, prior to 1873, such an action, if maintainable at all by the plaintiff in her own name, could be brought anywhere but in the Court of Chancery. Since the plaintiff's present right to serve a jury notice depends upon the answer to this precise question, it follows that, in my opinion, there is reason to doubt the correctness of the decision of Urquhart J. There can hardly be any question of the importance of this matter. If the contentions of the defendant are sound, no preferred beneficiary suing on an insurance policy issued subsequent to the year 1924 has any right to serve a jury notice.

For these reasons I feel I must grant the leave asked for. The costs of this application should, I think, be left to the disposition of the Court of Appeal.

Pursuant to leave granted by J. G. Kelly J., the defendant appealed to the Court of Appeal from the order of Urquhart J.

June 16th, 1941. The appeal was heard by MIDDLETON, HENDERSON and GILLANDERS JJ.A.

Evan Gray, K.C., and *G. K. Macdonald*, for the defendant, appellant.

G. T. Walsh, K.C., for the plaintiff, respondent.

June 23rd, 1941. MIDDLETON J.A.:—An appeal by leave of the Honourable Mr. Justice Kelly from an order of the Honourable Mr. Justice Urquhart in Chambers refusing to strike out a jury notice.

The action is brought by Anna Ruth Foster, the beneficiary named in three contracts of insurance, against a foreign insurance company having its head office in the City of Newark, in the State of New Jersey. The three contracts of insurance are dated 1928, 1935 and 1938. Dealing with them in chronological order, the first policy in 1928 is for \$1,000.00 and provides for the payment of \$2,000.00 in the event of the death of the insured by accidental means. The second policy in 1935 is for \$186.00, and also provides for further payment of a similar amount in the event of death by accidental means. The third and more important policy issued in March, 1938, is for \$5,000.00, and it also contains a provision for payment of an additional \$5,000.00 in event of accidental death of the insured.

Foster died as a result of a gunshot wound in his head said to be inflicted by himself.

There will be questions arising upon the exact wording of the policies which is said to be different in each case. The issue in the action arises in respect of the increased amount payable in the event of death from an accident.

It is said that the larger policy at any rate was applied for after the insured had made an application to the government indicating that he knew that he was suffering from tuberculosis. The policy was issued upon a condition which would render it void if the insured had knowledge of his diseased condition, and it is said that he had that knowledge as early as 1927.

These and other similar issues are raised by the pleadings.

Upon the application before Mr. Justice Urquhart he declined to strike out the jury notice, leaving the question to be dealt with by the Judge who might preside at the trial. The learned Judge had not his attention called to the history of the rule relating to striking out jury notices, Rule 398. That history is given in the case of *Wise v. Canadian Bank of Commerce* (1922), 52 O.L.R. 342. The Rule was passed at a meeting of the entire Bench after very full discussion and the intention was to impose upon the Judge to whom application is made in Chambers the duty of deciding whether the case should or should not be tried by a jury, and to avoid the expense incidental to having a long non-jury case tried while the jury sits idle or in the alternative a postponement of the case if the jury notice is struck out. There are other inconveniences which render it imperative in the view of the rule-making body to have the question of jury or no jury determined as early as possible. See also *Weatherall v. Weatherall*, [1937] O.R. 572.

The application was originally made solely founding it upon the provisions of this Rule, but upon the application for leave to appeal before Mr. Justice Kelly reliance was placed also upon sec. 55 of The Judicature Act, R.S.O. 1937, ch. 100. By subsec. 4 of sec. 55, subsec. 1, which permits a jury notice to be given, "shall not apply to causes, matters or issues over the subject of which before The Administration of Justice Act, 1873, the Court of Chancery had exclusive jurisdiction."

This matter was investigated by Mr. Justice Kelly very carefully in the judgment giving leave to appeal. It appears that in 1865 an Act was passed respecting insurance for the benefit of wives and children which made the insurance money a trust fund, and provided that a wife who was a beneficiary should have certain vested interests in the insurance fund. By virtue of this statute she was authorized in the event of an insurance for her benefit to sue in equity for the enforcement of the contract in her favour. This suit would be within the exclusive jurisdiction of the Court of Chancery. Subsec. 4 of sec. 55 provides that in such a case there is no right to give a jury notice and the plaintiff's only remedy would be to apply specially for a jury trial by virtue of the provisions of Rule 258. No such application has been made in this nor, so far as I am aware, in any similar case, the Court of Chancery being particularly jealous upon this subject.

If Mr. Justice Kelly is right I can see no answer to the application to strike out the jury notice. It is to be noted in considering this question that you must go back to the year 1873 to ascertain the right of the plaintiff. It is not sufficient to say that since that date she has another remedy afforded to her. At the critical date this remedy did not exist.

I am further of opinion that the case is not one calling for the intervention of a jury, and Mr. Justice Urquhart even on the matter arguable before him should have made an order striking out the jury notice. It is not entirely edifying to have a common jury exhorted to afford a widow justice as against a foreign insurance company.

In my view the appeal must be allowed on both grounds and the jury notice struck out. Under the circumstances I am prepared to let costs here and below to be in the cause.

GILLANDERS J.A. agreed with MIDDLETON J.A.

HENDERSON J.A.:—I have had the privilege of reading the opinion of my brother Middleton, the acting Chief Justice in this appeal, and I entirely agree with his conclusions and with the reasons therefor.

I have only to add that in my view this case is one of a class which should be tried by a Judge and not by a jury, and further, that when applications are made in Chambers to dispense with a jury, it is most desirable that the Judge in Chambers who hears such motion should exercise his discretion thereon.

Appeal allowed.

[COURT OF APPEAL.]

Re Perry.

Wills—Gift to a non-existing person—Admissibility of parol evidence to establish that another existing person was intended—Weight of such evidence.

The testator, Robert Frank Perry, who was a bachelor, died at the age of eighty-seven years. He was one of a family of twelve children, but only two sisters and two brothers, George A. Perry and John G. Perry, survived him. The testator in paragraph 3 of his will provided as follows: "All the rest and residue of my estate I give, devise and bequeath to my brother, George A. Perry, my brother, Charles W. Perry, and my sister, Annie P. Sabine, in equal shares." Charles W. Perry had in fact died before the execution of the will of the testator and the fact of the death of Charles W. Perry was then known to the testator.

John G. Perry by originating notice asked to have it declared that he was the person intended to benefit by the provision in paragraph 3 for "my brother Charles W. Perry".

Held, that, assuming that the presumption applied that the testator did not intend to make a bequest to his deceased brother, the extrinsic evidence before the Court could not support a finding that the applicant was the person intended. There was no indication in the will itself that the testator intended to benefit all his surviving brothers and sisters, nor were there any words indicating residence or description pointing to the applicant.

A motion by John G. Perry for an order declaring that the applicant is the person intended to benefit by a provision for "my brother Charles W. Perry" contained in the will of Robert Frank Perry, deceased.

The motion was heard by ROSE C.J.H.C. in Weekly Court at Toronto.

J. C. Risk, for John G. Perry.

W. J. A. Fair, for the next of kin of Charles Perry, deceased.

P. D. Wilson, K.C., Official Guardian, for infants.

J. L. G. Keogh, for the executors.

January 27th, 1941. ROSE C.J.H.C. (at the conclusion of the argument):

This case is perplexing. The testator had at the time of the making of the will two surviving brothers and two surviving sisters. He provided for one of the sisters by a legacy of \$1,000.00 and for the other sister by giving her one-third of the residue of his estate. He provided for two brothers by giving them each one-third of the residue. As to one of them, George, no question arises. His brother Charles was dead, but he named him as one of the two who were to share in the residue. The contention of John, the living brother who was not named, is

that the name "Charles" got into the will by a slip, and that he, John, is the person meant. The probabilities as disclosed by Mr. Peck's affidavits and the letter which, within a month after the execution of the will, he wrote to John seem to be that John, and not Charles, was intended.

Evidence of actual intention is admissible when there is an ambiguity in the will. In most cases the fact that there is an ambiguity emerges only when evidence of surrounding circumstances is given. In three cases, *In re Halston*, [1912] 1 Ch. 435; *Re Walker* (1923), 53 O.L.R. 480, and *Re Liebler*, [1938] O.W.N. 91, the making of a bequest to a person known to the testator to be dead has been held to give rise to this kind of ambiguity. The word does not appear to me to be altogether apt, but it is the word that has been used, and in the cases that have been referred to, the Court, upon parol evidence of intention, has given effect to the intention supposed to have been discovered.

In *Re Walker* Mr. Justice Middleton, and in *Re Liebler* Mr. Justice McTague, recognized the fact that the principle of acting upon the finding as to intention might be, or the practice of acting upon the supposed intention was, dangerous; nevertheless, they followed it. In this particular case, following it I should not have to stretch the practice as far as it was stretched in *Re Liebler*, and I think I ought to follow it unless the cases are distinguishable from the case in hand. What I might have decided if this had been a case of first impression, I do not know. I am not at all sure I should have seen my way clear to reaching a result such as was reached in those three cases; but, however that may be, there the cases are, and they ought to be followed by a single Judge unless, as I have said, they can be distinguished.

Well, it is said that they can be distinguished because the Legislature has provided in sec. 36 of The Wills Act, R.S.O. 1937, ch. 164, for the very case that has here arisen. The section says that when a legatee, being a brother of the testator, dies in the lifetime of the testator, either before or after the making of the will, leaving issue, any of whom are living at the time of the death of the testator (which is the case here), the bequest shall not lapse, but shall take effect as if the death of the legatee had happened immediately after the death of the testator, unless a contrary intention appears by the will.

Mr. Justice Lennox had that section before him in *Re McCallum* (1924), 27 O.W.N. 169, and while he referred to the fact that it was established by *Re Walker* that there is no presumption that a testator intends to benefit a person whom he knows to be dead, he applied the statute. Now at first that case appeared to me to be very like the case in hand. But Mr. Risk has pointed out the distinction, and I think it is a real distinction, between it and the present case. The testator in that case had given to his brothers Peter and Thomas each \$500.00. Peter, to the knowledge of the testator, had died before the execution of the will. So far the case is just like the case that we have here. But there is no suggestion, so far as the report shows, that there was a third brother and that the testator had used the name "Peter" when he meant to use the name of that third brother. And so the only question was whether there was a lapse. The statute said there was no lapse but that Peter's issue should take, and they took accordingly. Therefore, I think that *Re McCallum* does not, so far as the present will is concerned, displace in any way the effect of the three cases first mentioned, and that I ought to follow what I conceive to be the result of these cases and to declare that John Gilchrist Perry is entitled. The costs, of course, will have to come out of the estate. Mr. Fair represents so many persons that I suppose it would be difficult for me to fix his costs. Perhaps all the costs had better be taxed.

Mr. Risk: I would be content with that, my Lord. There were quite a number of preliminary matters.

His Lordship: All right. I am not altogether happy about the decision. I think I am coming perilously near to making a new will. But the practice has gone on for a number of years, and, as I have said, I do not think I am going quite so far as some of the other cases have gone.

Gordon Perry, one of the next of kin of Charles W. Perry, deceased, appealed to the Court of Appeal from the judgment of Rose C.J.H.C.

March 7th, 1941. The appeal was heard by ROBERTSON C.J.O., HENDERSON and GILLANDERS JJ.A.

W. J. A. Fair, for Gordon Perry, appellant, contended that the Court could not give effect to any intention which is not expressed or implied in the language of the will. The Court

should not admit evidence to show that the testator must have meant some person different from the person plainly referred to by the will: *Re Carrick* (1929), 64 O.L.R. 39; *Re Hooper*, [1936] O.R. 533; *Re Thompson*, [1936] O.R. 8; The Wills Act, R.S.O. 1937, ch. 164, sec. 36.

P. D. Wilson, K.C., Official Guardian, for infants claiming under Charles W. Perry, deceased, contended (a) that the actual testamentary intentions of the testator were not admissible, and (b) that the evidence produced was not sufficient or adequate for the purpose of establishing the respondent's claim: Hawkins on Wills, 3rd ed., pp. 15, 19; Theobald on Wills, 9th ed., pp. 100-114; *Charter v. Charter* (1874), L.R. 7 H.L. 364.

J. C. Risk, for John G. Perry, respondent, contended that the testator could not be supposed to have intended to benefit a person whom he knew to be dead at the date of the will and parol evidence is admissible to show who was intended by the description used in the will: *Re Walker*, 53 O.L.R. 480; *Re Liebler*, [1938] O.W.N. 91; *Re Halston*, [1912] 1 Ch. 435; *Re Ofner*, [1909] 1 Ch. 60.

There is no question of lapse involved; the respondent's contention is that there was no legacy left to Charles W. Perry but that it was left to John G. Perry. Hence, sec. 36 of The Wills Act has no application.

J. H. Amys, for the executors of the will of Robert Frank Perry, deceased, submitted their rights to the Court.

Cur. adv. vult.

March 31st, 1941. The judgment of the Court was delivered by GILLANDERS J.A.:—The testator Robert Frank Perry, a bachelor, died on August 11th, 1939, at the age of eighty-seven years. He was one of a family of twelve children, but only two sisters, Mary Edith Bliss and Annie P. Sabine, and two brothers, George A. Perry and John G. Perry (the applicant in these proceedings) survive him.

The testator's will, after providing for two legacies of \$1,000.00 each, one to his sister, Mary Edith Bliss, provides as follows:

"3. All the rest and residue of my estate I give, devise and bequeath to my brother, George A. Perry, my brother, Charles W. Perry, and my sister, Annie P. Sabine, in equal shares."

His brother, Charles W. Perry predeceased the testator, having died in 1936, over three years before the testator. The material shows that this fact was known to the testator within three months after his brother's death and long before the drawing of his will, which is dated July 21st, 1939. Of his four surviving brothers and sisters, all are mentioned by name in the will except the applicant, John G. Perry, who launched these proceedings to have it declared that he is the person intended to benefit by the provision for "my brother Charles W. Perry".

The application came on before the Chief Justice of the High Court, who held in favour of the applicant that he is entitled to the legacy left by paragraph 3 to "my brother Charles W. Perry". From this decision this appeal is taken.

The applicant, John G. Perry, submits that the testator's brother, Charles, being dead to his knowledge when the will was drawn, it cannot be supposed that it was intended to benefit the deceased brother; that under these circumstances parol evidence is admissible to show, if possible, the identity of the person intended to be benefited; and that the material on this application indicates that the applicant, John G. Perry, is the person so intended.

In support of this submission he relies on a line of cases both in England and here. Of the more recent is *In re Ofner*, [1909] 1 Ch. 60, where the testator gave a legacy "to my grandnephew Robert Ofner". The testator had no grandnephew or other relative of the name of Robert Ofner, but did have a grandnephew Richard. Cozens-Hardy M.R. says in part:

"One cannot suppose the testator intended to make a gift to a non-existing person. According to the language of Wood V.C. in *Bernasconi v. Atkinson*, 10 Hare 348, 'the Courts have a right to ascertain all the facts which were known to the testator at the time he made his will, or (as it has been expressed), to place themselves in the testator's position, in order to ascertain whether there exists any person or thing to which the description can be reasonably and with sufficient certainty applied,—the presumption necessarily being, that the testator intended some existing matter or person'. Therefore it seems to me we start with this, that the testator did intend some person by the words 'my grandnephew Robert Ofner'. There must therefore be a misdescription somewhere, and what we have to discover is whether there is any person, whom he has misdescribed by the term 'Robert

Ofner'—whether, in fact, 'Robert' was a phrase which he incorrectly used to describe the person who was really 'Richard' the brother of Alfred."

On this basis the Court admitted as evidence the written instructions of the testator in his own handwriting almost contemporaneous with the will and signed by him, a reading of which indicated that the testator erroneously thought Richard's name was Robert. The document was admitted, not as evidence of the testator's intention, but as evidence of the meaning of the name, and on this evidence the Court concluded that "Robert" was a mistake for "Richard".

In *In re Halston*, [1912] 1 Ch. 435, certain property was devised to John William Halston. There had been a nephew of that name, who, to the testator's knowledge, had died when only ten days old, some seventeen years before the making of the will. Eve J. says in part:

"To begin with, one cannot assume the testator intended to make a devise to a non-existing person, he must have contemplated some person, whom at least he believed to be alive at the date of his will, as the object of his bounty, and the duty of the Court is to ascertain, if practicable, whom he did intend."

The Court looked at evidence of surrounding circumstances: that the testator knew of the death of the nephew named; had desired that a younger brother should bear one of the names of the deceased boy; that the younger brother was christened "John Robert" instead of "John William", but there was no evidence that the testator knew this; and that the testator took an interest in the boy, who was constantly staying with him. The Court also admitted evidence that the testator had told the boy at one time that the property would be his.

In our Courts a similar question arose in *Re Walker* (1923), 53 O.L.R. 480, where Mr. Justice Middleton reviews a number of authorities and follows *In re Halston* (*supra*). In that case there was evidence by the lady who drew the will that, being nervous and excited at an unfamiliar task, she had inserted the wrong name, and the error was not discovered until after the testator's death, and on this basis the learned Judge found the real intention was "abundantly plain". He proceeds to indicate that when once it is established that the person named was not intended "there remains in the written document enough to show an intention to benefit a nephew in Chicago wrongly named

so far as his Christian name is concerned. All other living members of the Parkin family are remembered, and, eliminating them, the applicant alone remains", and concludes: "But why guess the intention when credible proof is at hand?"

In *Re Liebler*, [1938] O.W.N. 91, Mr. Justice McTague, after reviewing the cases above mentioned, did not find in the material before him "the strong evidence from the surrounding circumstances before the Court" in *Re Ofner*, *Re Halston* and *Re Walker*, but under the circumstances of that case felt justified in carrying the "process of elimination" to its logical conclusion, and where it was clear from the will that the testator intended to benefit three cousins and eight nephews and nieces, and that two of the nephews resided in Tavistock, and where extrinsic evidence established that there were only eight nephews and nieces alive when the will was drawn, the claimant being one of them, two residing in Tavistock of whom the claimant was one, he held that the claimant was entitled to the legacy purporting to be left to the deceased nephew.

In this case the only material extrinsic evidence before the Court is in short:

(1) Two affidavits of the solicitor who drew the will in part to the effect that when the testator came in to have his will drawn "he stated then that he desired to benefit the surviving members of his family and undertook to give me their full names and described them as set out in paragraph 3 of the said will"; that the solicitor feels certain the deceased intended to give the name of John G. Perry in place of the name of Charles W. Perry as the deceased had made it quite clear that he intended to benefit those of his kin who were then living; and in a subsequent affidavit that when he, the solicitor, used the term "surviving members of his family" he meant the testator's immediate family, in other words his surviving brothers and sisters, and further when he used the term next "of kin who were then living" he meant the testator's immediate kin, in other words his surviving brothers and sisters. The affidavits further state that the testator understood and attended to his business affairs in a capable manner, but for some months his memory for names had been failing.

(2) The applicant's affidavit discloses that while he and the testator had always been on friendly terms they had not seen

each other for a considerable number of years, but corresponded once or twice a year.

If because of the prior death of Charles W. Perry the presumption applies that the testator did not intend to make a bequest to his deceased brother, then the question arises whether or not on the extrinsic evidence before the Court the person intended can be ascertained. The evidence in this case does not support a finding that the applicant is the person intended. There is no indication here in the will itself that the testator intended to benefit all his surviving brothers and sisters, nor any words indicating residence or description pointing to the applicant. One of the surviving sisters takes no benefit under clause 3, although she is given a legacy by a previous clause. There remain only the inconclusive affidavits which might in any way be said to support the applicant's contention. There is no attempt to set out the words used by the testator. If they were given it would be for the Court to determine what conclusion should be drawn from them. We have not here even a sound basis from which to proceed in a process of elimination as in *In re Liebler (supra)*.

This is I think conclusive of the question.

It is urged on behalf of the appellants that this case should be clearly distinguished from the cases cited by reason of sec. 36 of The Wills Act, which provides as follows:

"36 (1) Where any person, being a child or other issue or the brother or sister of the testator to whom any real estate or personal estate is devised or bequeathed, for any estate or interest not determinable at or before the death of such person, dies in the lifetime of the testator either before or after the making of the will, leaving issue, and any of the issue of such person are living at the time of the death of the testator, such devise or bequest shall not lapse but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention appears by the will.

"(2) The provisions of this section shall apply to a devise or a bequest to children or other issue or to brothers or sisters as a class."

It is also pointed out that there was not and is not any provision in the English Wills Act which extends to "a brother or sister of the testator" as does sec. 36 and that the cases

cited in our own Courts involved nephews and the section in question was not applicable. In the cases cited, the bequest or devise in question would have lapsed had the Court been unable to find the person intended to take.

It is urged by counsel for the appellants that because the section contemplates the very case of a devise or bequest to a person who died in the lifetime of the testator either before or after the making of the will, and provides that in certain cases, including as here a bequest to a deceased brother who has left issue surviving the testator, the devise or bequest is not to lapse, "but shall take effect as if the death of such person had happened immediately after the death of the testator"; that there is in such a case no presumption that the testator did not intend to benefit those who would take by a gift to the deceased brother and that extrinsic evidence is not admissible to ascertain if possible the person intended.

On the other hand, Mr. Risk urges that the applicant is not claiming under Charles W. Perry, that his contention is that there is no gift to Charles W. Perry but that the gift is in fact to the applicant John G. Perry and that we are only concerned here in ascertaining to whom the property is bequeathed.

In re Karch (1921), 50 O.L.R. 509, while the point under consideration was not, as here, the identity of the person to take but the applicability of the section in the distribution of the estate there in question, Middleton J.A. indicates the remedial intent of the section was "to prevent testators dying intestate, a result which the law regards with the same abhorrence as that with which nature regards a vacuum."

In re McCallum (1924), 27 O.W.N. 169, Lennox J. applied the section to prevent a lapse. No person was there claiming to be the person in fact intended to be benefited by the legacy.

The recent case of *Re Hurd; Stott v. Stott*, [1941] 1 All. E.R. 238, throws some light on the view that should be taken of sec. 36. The Court was there considering sec. 33 of the English Act which is similar but does not extend to brothers and sisters of the testator, and the question was one of distribution. After discussing whether or not distribution should be made as if the beneficiary survived the testator and died "immediately after the death of the testator" or as of the actual death of the beneficiary, Farwell J. says: "On the whole I have come to the conclusion that this section does not apply beyond providing

for the prevention of the lapse. That is to say, it is not intended to do anything more than prevent the gift having no effect at all, with the result that the gift which would otherwise have lapsed passes to the person who is the legal personal representative of the deceased, who takes it as part of the estate of the deceased person."

If one views the section in this way, and as confined to the prevention of a lapse, one would hesitate to say that it rules out inquiry as to the person intended to benefit when the beneficiary named has predeceased the testator. In the case at bar, the applicant having failed to show that he is the person intended to benefit, the section prevents a lapse of the gift.

The appeal should be allowed and the applicant's motion dismissed.

Under the circumstances, I think all parties might have their costs of the motion and of this appeal out of the estate; those of the solicitors for the executors as between solicitor and client.

Appeal allowed.

[COURT OF APPEAL.]

Farmers Union Mutual Fire Insurance Co. v. Hanrahan.

Insurance — Fire — Mortgages — Subrogation clause in fire insurance policy—Payment of loss by insurance company to mortgagee—Assignment of mortgage by mortgagee to insurance company—Right of insurance company to enforce the mortgage.

The right of a fire insurance company to be subrogated to the mortgage rights of a mortgagee, in the case of a policy of fire insurance containing the usual mortgage or subrogation clause, depends upon whether the fire insurance company has a good defence against the claim of the mortgagor, who, as between himself and the insurance company, is the party insured. It is not necessary for the insurance company, before it becomes entitled to subrogation, first to establish by action that it was under no liability to the insured: *Bull v. The North British Canadian Investment Company and The Imperial Fire Insurance Company* (1888), 15 O.A.R. 421, followed. The report of the *Bull* case on appeal to the Supreme Court of Canada in 18 S.C.R. 697 is erroneous, as pointed out in Cameron's Supreme Court Cases, p. 1, and the real decision by the Supreme Court of Canada was simply an affirmation of what had been held by the Court of Appeal for Ontario: *McKay v. Norwich Union Insurance Company* (1896), 27 O.R. 251, not followed.

AN appeal by the defendant from the judgment of His Honour Judge McGibbon, of the County Court of the County of Victoria, in favour of the plaintiff in an action brought to enforce a mortgage of land.

May 6th, 1941. The appeal was heard by MIDDLETON, FISHER and McTAGUE JJ.A.

W. J. A. Fair, for the defendant, appellant.

J. R. Cartwright, K.C., and *E. D. Fulton*, for the plaintiff, respondent.

May 21st, 1941. MIDDLETON J.A.:—Appeal by the defendant from judgment pronounced in an action on a mortgage, taking an account of the amount due and fixing a day for redemption and in default foreclosure. The defendant contends that the mortgage originally made in favour of the Canada Farm Loan Board, and assigned by the Board to the insurance company on the 14th June, 1938, was paid off and discharged by the payment by the insurance company to the original mortgagee of the sum of \$416.00. The plaintiff admits that the \$416.00 was paid by it under and by virtue of a subrogation clause contained in the insurance policy.

The mortgage was originally made in favour of the Farm Loan Board to secure repayment of \$500.00, and the mortgage contained a proviso requiring the property to be insured. The Farm Loan Board wrote Hanrahan, the mortgagor, drawing

his attention to the fact that no insurance had been placed and asking him to place insurance, and in default the mortgagees would themselves insure. Accordingly he effected an insurance, which contained the usual mortgagee or subrogation clause, providing that in the event of the insurance company claiming that no liability to the mortgagor existed, it should be legally subrogated to all rights of the mortgagees under all the securities held as collateral to the mortgage debt, to the extent of such payments, or, at its option, it would pay to the mortgagees the whole principal due or to come due on the mortgage, with interest, and should thereupon receive full assignment and transfer of the mortgage and all other securities held as collateral to the mortgage debt, but no such subrogation should impair the rights of the mortgagees to recover the full amount of their claim.

This insurance was placed and the policy issued on 22nd July, 1936. A fire took place and the insurance company took such steps that the Fire Marshal was called in and investigated, and afterwards prosecuted Hanrahan, the owner, for arson. Hanrahan was acquitted, largely by reason of a claim made by him that he owned the property and "was it likely that he would destroy it?" The insurance company was by no means satisfied with his acquittal and made up its mind not to pay the loss. No formal proofs of loss were filed by Hanrahan, the mortgagor. The mortgagees claimed payment of the loss and the insurance company paid the mortgagees in full and received an assignment. This payment was accompanied by a letter in which the insurance company expressed, as stated, that they paid by virtue of the subrogation clause and not as an admission of liability.

The criminal trial took place on the 10th December, 1937, and payment of the amount to the mortgagees took place in the following June. This action was commenced a year later, on the 9th June, 1939. The action is upon the mortgage, and the defence and counterclaim set out an insurance policy, and that the amount claimed as due thereon should be paid to the defendant, less the amount of the mortgage. It is worth noting that the insurance policy is for \$1,000.00; the defendant claims it was for \$1,400.00. The amount due upon the mortgage was \$416.00 with subsequent interest and costs. The Judge at the trial found for the plaintiffs. No proofs of loss have ever been made, and

the insurance company set up in reply the failure to comply with the requirements of the policy in that regard.

The defendant's contention is that the insurance company is liable to pay the amount of the smaller policy. His contention is based upon a misunderstanding of the report of the case of *Imperial Fire Insurance Co. v. Bull* (1889), 18 S.C.R. 697. He failed to notice the fuller report of this same case in Cameron's Supreme Court Reports, p. 1. The case is there reported because, as indicated, of the inaccuracy of the report in 18 S.C.R. 697. There it is really a note of the decision and not by any means a full report. In Cameron's Supreme Court Reports the report is given in full, and it appears that the case was argued and determined by four Judges—Mr. Justice Patterson took no part, having sat as a member of the Court appealed from. The judgment was given by Mr. Justice Strong, who was of the opinion that the appeal should be dismissed, with costs. Mr. Justice Fournier said that the judgment of the Court of Appeal was right and should be affirmed and the appeal should be dismissed. Mr. Justice Taschereau agreed with Mr. Justice Gwynne. Mr. Justice Gwynne wrote at considerable length, pointing out that the insurance there was effected by the mortgagee, and the mortgagee was bound to effect an insurance of the mortgaged premises for the benefit of the mortgagor, for he sought to charge him with the premium, and the insurance was one not for the benefit of the mortgagee and was unwarranted. The subrogation clause, therefore, was inserted without the knowledge or consent of the mortgagor and did not in fact bind him. Here, the insurance was effected by the mortgagor. It did contain a subrogation clause and the insurance company, dealing fairly with the mortgagor, sent the policy to the mortgagee, but sent also a copy of the policy to the mortgagor, so he had notice and knowledge of that which was agreed upon.

It must also be noted that the right of the mortgagee is to sue upon the contract in its name. This right was conferred by statute, which is now known as The Insurance Act, R.S.O. 1937, ch. 256, sec. 95, subsec. (2). This statute provides that after the sixty days, or shorter period stipulated, a beneficiary entitled to the insurance money and having the right to receive the same and to give an effectual discharge therefor, may sue for the same in his own name, any rule or stipulation to the contrary notwithstanding. Under the terms of the correspondence relating to the

payment and the giving of the assignment, it is plain that the insurance company did not undertake to claim or to sue for anything beyond that which was rightfully its own, and the defendant cannot be taken to have brought any action against the insurance company until the delivery of the statement of defence and counterclaim on the 30th September, 1939, and the defence and counterclaim was clearly too late, and defective in that it does not allege the delivery of any proofs of loss.

The appeal must, therefore, be dismissed with costs, which should be added to the judgment issued, and it should be varied accordingly. If the mortgagee does not desire to interfere with the judgment already issued, he will have the costs as a substantive claim.

FISHER J.A. agreed with MIDDLETON J.A.

McTAGUE J.A.:—I agree with my brother Middleton that the appellant appears to have proceeded under an erroneous impression as to what the law is in this type of case.

In *Bull v. The North British Canadian Investment Company and The Imperial Fire Insurance Co.* (1888), 15 O.A.R., the general principle was laid down that the right of an insurance company to be subrogated to the mortgage rights of the mortgagee in the case of a policy of insurance containing the usual subrogation clause depends upon whether it has a good defence against the claim of the mortgagor, who as between himself and the insurance company is the party insured. On appeal to the Supreme Court of Canada two of the Judges in a Court of four appear to have placed the obligation of the insurance company higher by holding that before it becomes entitled to subrogation it must first establish by action that it was under no liability to the assured. This holding was erroneously reported as the decision of the Court in 18 S.C.R. 697. As is pointed out in Cameron's Supreme Court Cases, p. 1, the real decision was simply an affirmation of what had been held in the Ontario Court of Appeal. Whatever weight may be given the opinions of the two Judges who concurred in setting forth the view incorrectly reported as the decision of the Court, the fact remains that it was not the Court's decision and is therefore not binding, although it was subsequently treated as binding in *McKay v. Norwich Union Insurance Company* (1896), 27 O.R. 251.

In my view, the correct principle is still to be found in the judgment of the Court of Appeal in the *Bull* case. Accepting the principle therein laid down as applied to the facts of the case at bar, dealt with by my brother Middleton, the insurance company was entitled to the assignment of the mortgage in question and is entitled to its judgment for foreclosure.

I would therefore join with my brother Middleton both in dismissing the appeal and disposing of the costs.

Appeal dismissed with costs.

[COURT OF APPEAL.]

Finnie v. Webster et al.

Pleadings—Action by pedestrian against owner and driver of motor vehicle for damages for personal injuries—Whether plaintiff must assert negligence in statement of claim—Onus of proof—Rule 151—The Highway Traffic Act, R.S.O. 1937, ch. 288, sec. 48(1).

In an action brought by a pedestrian against the owner and driver of a motor vehicle for damages for personal injuries caused by the motor vehicle on a highway it is not necessary for the plaintiff in the statement of claim to allege that the defendants were negligent. By sec. 48(1) of The Highway Traffic Act, R.S.O. 1937, ch. 288, in such an action the onus of proof is upon the defendants that the loss or damage sustained by the plaintiff did not arise through the negligence or improper conduct of the owner or driver of the motor vehicle, and Rule 151 provides that neither party need in any pleading allege any matter of fact which the law presumes in his favour or as to which the burden of proof lies upon the other side. In such an action the defendant in the statement of defence must deny negligence and the plaintiff is entitled to succeed without either alleging negligence in the statement of claim or proving negligence.

A motion by the defendants for an order striking out the statement of claim on the ground that it discloses no cause of action and on the further ground that the statement of claim is embarrassing in not specifying the grounds upon which the plaintiff bases her claim.

The motion was heard by J. G. KELLY J. in Chambers at Toronto.

D. Haines, for the defendants.

R. D. Jennings, for the plaintiff.

April 8th, 1941. J. G. KELLY J. (at the conclusion of the argument):—The action is by a plaintiff against two defendants, the owner and driver, respectively, of a motor car for injuries

sustained when the plaintiff, a pedestrian, was struck by the motor car upon a highway. The statement of claim describes the parties, gives the time and place and date of the accident, and describes the injuries, and in the prayer for relief claims \$10,000.00 damages. There is no allegation of negligent driving or improper conduct on the part of the defendants.

The defendants say in support of this motion that they are entitled to know what the charge is against them, whether they are being charged with trespass or negligence; but, practically, they say they are unable to plead to the statement of claim drawn in its present form. In answer to this the plaintiff points out sec. 48 of The Highway Traffic Act, R.S.O. 1937, ch. 288, subsec. (1) of which reads:

“When loss or damage is sustained by any person by reason of a motor vehicle on a highway, the onus of proof that such loss or damage did not arise through the negligence or improper conduct of the owner or driver of the motor vehicle shall be upon the owner or driver.”

The plaintiff also points to Rule 151, which says:

“Neither party need in any pleading allege any matter of fact which the law presumes in his favour, or as to which the burden of proof lies upon the other side.”

The plaintiff's argument is that there being an onus to establish absence of negligence, or, to put it another way, a presumption of negligence in a case such as this, she is not obliged to allege any negligence in the pleading. I do not agree. The pleading as drawn is a pleading which would be proper in a case coming within the rule in *Rylands v. Fletcher*, the rule of absolute liability.

It is true, undoubtedly, that at trial in an action by a pedestrian based on negligence, the onus of disproving the negligence will lie upon the defendants; but this is an action not based on negligence at all; this is an action not based on any branch of law so far as is discernible.

In *Winnipeg Electric Co. v. Jacob Geel*, [1932] A.C. 690, Lord Wright, giving the judgment of the Privy Council, assimilates the statutory onus to the burden upon a defendant in a case to which the doctrine *res ipsa loquitur* applies, and in the 9th edition of Salmond on Torts, at page 606, the distinction in the matter of pleading is drawn succinctly. The author there says that if the plaintiff states his case on the principle of

Rylands v. Fletcher he need only plead the escape; if he states his claim in negligence he must plead negligence. The author there is distinguishing between the rule in *Rylands v. Fletcher* and the principle *res ipsa loquitur*.

The effect of the Rule, and of the authorities, and of the section of the statute is simply this: At trial in an action based upon negligence brought by a pedestrian against a motor car owner and driver for injuries sustained on the highway as a result of the operation of a motor car the plaintiff need only prove the circumstances, the injury and the cause, without proving any negligent conduct; but that is all premised upon an action based upon negligence, and the plaintiff should make clear to the defendant that his claim is brought for negligence. The principle *res ipsa loquitur* and the onus of proof in the section both deal with proof of negligence. The section does not say that the owner and driver are liable in the absence of negligence. The rule is not one of absolute liability.

The order should be that the plaintiff may amend her claim within five days to plead, if such is the case, that the injuries complained of were the result of negligent driving of an automobile. The defendants will have the usual ten days from the date of such amendment to defend, and in the absence of any amendment within five days the statement of claim will be struck out as embarrassing to the defendants. Costs of this motion will be in the cause.

Pursuant to leave granted by Rose C.J.H.C., the plaintiff appealed to the Court of Appeal from the order of J. G. Kelly J.

June 10th, 1941. The appeal was heard by ROBERTSON C.J.O., MIDDLETON and McTAGUE J.J.A.

John Jennings, K.C. (for *R. D. Jennings*, on active service), for the plaintiff, appellant.

D. Haines, for the defendants, respondents.

June 24th, 1941. ROBERTSON C.J.O.:—I concur in the judgment of Middleton J.A. and desire to add only one or two observations.

It is not necessary that a plaintiff should state in his pleading the legal principle upon which he bases his action. Forms of action were abolished a long time ago. No doubt defendants are entitled to be informed of the case they have to meet, and so

they are here. They are informed by the statement of claim that while the daughter of the defendant, John C. Webster, was driving his motor car on a public highway, the motor car struck the plaintiff, who was walking on the highway, and that the plaintiff was thereby injured, and claims damages. The defendants know that unless they can prove that the plaintiff's loss or damage did not arise through the negligence or improper conduct of the driver, judgment will go against them, and, if they intend to prove that, they must plead it in some form.

It serves no purpose to say that the contentions of the appellant fail to distinguish between rules of evidence and rules of pleading. Rule 151, which is a rule of pleading, makes it necessary to consider, and on occasion to follow, the rules of evidence in pleading. But for the statute (sec. 48 of The Highway Traffic Act) and this Rule it would be necessary for the plaintiff both to prove and to plead that her damage arose through the negligent or improper conduct of the defendants. The statute made it unnecessary for the plaintiff to prove this. Thereupon, Rule 151 applies and makes it unnecessary to plead it. I do not know what Rule 151 means if it is otherwise.

Rule 151 is one of the Rules designed to simplify pleading, and it is now unnecessary to state matters that in former times were essential to proper pleading. A reversion to more technical forms of pleading is undesirable and is contrary to the Rules.

MIDDLETON J.A.:—This is an appeal by leave of the Chief Justice of the High Court from the order of the Honourable Mr. Justice Kelly, bearing date the 8th day of April, 1941, by which Mr. Justice Kelly ordered that the plaintiff do amend her statement of claim by pleading that the injuries complained of were the result of the negligent driving of the automobile in question, and failing such amendment that the plaintiff's statement of claim be struck out as embarrassing to the defendants.

The Highway Traffic Act, R.S.O. 1937, ch. 288, sec. 48(1), reads as follows:

“When loss or damage is sustained by any person by reason of a motor vehicle on a highway, the onus of proof that such loss or damage did not arise through the negligence or improper conduct of the owner or driver of the motor vehicle shall be upon the owner or driver.”

Consolidated Rule 151 provides:

"Neither party need in any pleading allege any matter of fact which the law presumes in his favour, or as to which the burden of proof lies upon the other side" (*e.g.*, consideration for a bill of exchange).

Embodied in the first statute above quoted was a complete departure from the formerly existing law. The onus is now upon a defendant who is the owner or driver of a motor vehicle, where the plaintiff is a pedestrian on a highway, to negative negligence or take the consequences. Rule 151, above quoted, places the onus upon a defendant in such circumstances to deny negligence, and entitles the plaintiff to succeed without charging or proving negligence.

That this is the effect of the Statute is made abundantly plain from the decision of the Privy Council in *Winnipeg Electric Co. v. Geel*, [1932] A.C. 690, and [1931] S.C.R. 443, particularly per Duff J., now C.J.C., at p. 447.

One cannot peruse these judgments without being convinced of the change made by this legislation. The defendant has to establish his innocence. The onus is not upon the plaintiff to establish that he is guilty. Proof must follow the allegations in the pleading, and the plaintiff is entitled to rely upon the amendment to the statute as relieving him from his former liability to plead the negligence relied upon.

To the same effect is the judgment of Mr. Justice Dysart in *Mitchell v. Campbell* (Man.), [1937] 1 D.L.R. 603.

It is not unreasonable for the Legislature to impose, as a term of the granting of the license to operate a dangerous machine upon a highway, liability to those there using it to accept the risk establishing a negative as the price of the license to operate.

We do not regard the question as of much practical importance, although its theoretical value may be considerable, and so while we allow the appeal and direct the defendant to plead within ten days from the date of this judgment, we leave the costs as they were left in the Court below to be costs in the cause.

McTAGUE J.A. (dissenting):—Appeal by leave of the Chief Justice of the High Court from an order of the Honourable Mr. Justice Kelly bearing date the 8th day of April, 1941, by which on motion by the defendants to strike out the statement of claim as showing no cause of action the learned Judge gave leave

to the plaintiff to amend her statement of claim so as to plead negligence generally and failing such amendment ordered that the statement of claim be struck out.

The statement of claim, paragraph 2, simply alleges that "On Friday, September 13, 1940, about the hour of 11.35 p.m. the plaintiff, while walking across Avenue Road, a public highway in the City of Toronto, at or near Burnaby Boulevard, was struck by a 1936 Oldsmobile sedan owned by the defendant, John Charles Webster, and operated at that time by the defendant, Doreen Webster". Then follows a recital of the injuries sustained and a claim for damages.

Counsel for the plaintiff states quite frankly that the omission to allege negligent driving or improper conduct is quite deliberate. His contention is that sec. 48(1) of The Highway Traffic Act, R.S.O. 1937, ch. 288,

"When loss or damage is sustained by any person by reason of a motor vehicle on a highway, the onus of proof that such loss or damage did not arise through the negligence or improper conduct of the owner or driver of the motor vehicle shall be upon the owner or driver", obviates any necessity of so pleading when considered together with Consolidated Rule 151:

"Neither party need in any pleading allege any matter of fact which the law presumes in his favour, or as to which the burden of proof lies upon the other side."

Mr. Justice Kelly has taken the view, and I agree with him, that sec. 48(1) of The Highway Traffic Act has nothing to do with pleading but only with onus of proof. Trying to combine it with Rule 151 does not, in my opinion, advance the matter.

The simple basic principle, I think, is that a defendant is entitled to know the cause of action he has to meet. The combined effect of sec. 48 and Rule 151 undoubtedly dispenses the plaintiff from pleading any facts in support of an allegation of negligence or improper conduct but does not warrant a pleading which *in se* discloses no cause of action. The analogy of not having to plead consideration in an action on a bill of exchange is hardly appropriate. I think if the substantive claim is on the consideration and not on the bill, consideration must be pleaded. While I have not the text before me, I think I shall be found to be substantiated on the point by Odgers on Pleading, the 1934 edition, where the similar English Rule is discussed.

Counsel for the plaintiff here seems to be asserting the view that sec. 48, subsec. 1, created a new cause of action. I do not think so. What it does as against owners and drivers of motor vehicles is create a rebuttable presumption of negligence or improper conduct. The cause of action itself is the old cause of action which existed before the statute, and in my view the cause of action must still be disclosed in the statement of claim.

Much has been made of a dictum of the present Chief Justice of Canada in *Winnipeg Electric Co. v. Geel*, [1931] S.C.R. 443, at p. 447, where he says: "In truth, it is not incumbent upon the plaintiff proceeding under the statute, to charge negligence in terms; for the reason that the law presumes negligence in his favour, and the burden of rebutting the presumption lies upon the defendant." It is to be noted that the learned Chief Justice did not say it was not necessary to plead negligence at all. He said it was not necessary to plead negligence in terms. I take it that he meant it was not necessary to plead negligence in particulars because in the context the dictum follows his observation that in the case before him counsel for both sides had proceeded upon the erroneous assumption in the pleadings and to the end of the trial that it was the duty of the respondent to give particulars of negligence and to establish the existence of negligence as particularized. If it had been the learned Chief Justice's view that no allegation of negligence was necessary he would have said just that. In the same case Lord Wright, *Winnipeg Electric Co. v. Geel*, [1932] A.C. 690, at p. 695, goes very thoroughly into what a plaintiff must establish under such an onus section but not what he must plead. It seems to me that there is nothing unusual in a plaintiff being dispensed from establishing by a statute something that he must plead so as to disclose a good cause of action.

The case of *Mitchell v. Campbell*, [1937] 1 D.L.R. 603, is not particularly helpful. In the first place, the statement of claim in that case specifically pleaded The Manitoba Traffic Act. In the second place Mr. Justice Dysart allowed the plaintiff to amend so as to plead negligence specifically, and actions speak louder than words even in Court or Chambers. In the same case in the Court of Appeal, [1937] 3 D.L.R. 542, Trueman J.A. took the view that although the original statement of claim disclosed no cause of action the plaintiff was entitled to the amendment. Robson J.A. seems to have thought that the defendants could not

succeed because they had taken so many steps in the action after the original statement of claim was delivered. The other three Judges agreed in the result, and the result was that the plaintiff was allowed to go to trial on a statement of claim amended to plead negligence.

Since the argument of the motion I have conjectured somewhat if the plaintiff may not be unwittingly preparing for herself some little difficulty by refusing to allege negligence. Although the onus is in her favour, she may be in possession of facts establishing negligence, or her witnesses may be. It is possible that she will not be allowed to adduce evidence of negligence when she has not pleaded it. I suppose in reply she could adduce evidence to offset the defendants' explanations, but could she go further and set up affirmatively evidence of other acts without having pleaded negligence? One academic difficulty seems to lead to another even in Courts of Law.

It was said in argument that it should make no difference to the defendants whether negligence or improper conduct was pleaded or not, that they must know the case they have to meet under the statute. I think they are entitled to know what they are charged with even under the statute. It may make some difference to the owner defendant because while sec. 48(1) places an onus to disprove both negligence and improper conduct, sec. 47(1) makes the owner liable for damages caused by negligence but is silent on the owner's liability for improper conduct of the driver. In certain circumstances an owner may not be liable for improper conduct of his driver.

I think with Mr. Justice Kelly that the whole matter gets back to the first basic principle that a cause of action must be shown regardless of the statute and the Rule, and the defendant is entitled to know what is the cause of action against him. I should dismiss the appeal and let the defendants have the costs of the motion for leave to appeal and of this motion in any event.

Appeal allowed, McTAGUE J.A. dissenting.

[COURT OF APPEAL.]

Consumers' Gas Company of Toronto v. The Corporation of the City of Toronto.

Municipal Corporations—Highways—Removal or change of location of gas company's mains caused by construction or reconstruction of highways—Recovery of cost—Interpretation of The Public Service Works on Highways Act, R.S.O. 1937, ch. 57.

The Public Service Works on Highways Act, R.S.O. 1937, ch. 57, now fixes the basis for computing the compensation to be paid by the defendant municipality to the plaintiff company, where in the course of constructing, reconstructing, changing, altering or improving any of the defendant municipality's streets it becomes necessary to take up, remove or change the location of any of the plaintiff's pipes or pipe lines placed on or under such streets.

The word "highway" in the said Act means a public road or way open equally to everyone for travel and includes the public streets of an urban district equally with connecting roads between urban districts. The plaintiff contended that the said Act should not be construed as retroactive or as affecting the plaintiff's vested rights in respect of pipes already laid. However the Act does not affect the right of the plaintiff to place and maintain its pipes on or under the streets, but affects the plaintiff's right to compensation under what is now sec. 347 of The Municipal Act, R.S.O. 1937, ch. 266; the right to compensation does not accrue and is not a vested right until the defendant has expropriated or injuriously affected "land" of the plaintiff, as land is interpreted by sec. 1(g) of the Municipal Act.

There is nothing in the plaintiff's private Act of incorporation referring to any bargain or agreement with the defendant municipality and the plaintiff is not excluded from the application of The Public Service Works on Highways Act by anything in its private Act of incorporation. The plaintiff's right to compensation for expropriation or injurious affection has always rested upon the compensation provisions of The Municipal Act and not upon any provision in its private Act of incorporation. Hence there is no alteration of the terms of any bargain, if there was a bargain, when the legislature by another general Act, such as The Public Service Works on Highways Act, modifies, in certain cases affecting the plaintiff, the statutory right to compensation given by The Municipal Act.

The Public Service Works on Highways Act does not apply where the removal or change of the plaintiff's mains or pipes has been caused by the construction of a sewer, whether for sanitary purposes or for surface drainage, by the defendant. The Act applies only where the defendant has proceeded in the exercise of its powers to construct, reconstruct, change, alter or improve a highway.

AN action to recover the cost of removing, replacing and repairing certain gas mains and pipes of the plaintiff company.

The action was tried by HOGG J., without a jury, at Toronto.

W. N. Tilley, K.C., and J. L. Wilson, K.C., for the plaintiff.

C. M. Colquhoun, K.C., and F. A. A. Campbell, K.C., for the defendant.

March 26th, 1940. HOGG J.:—In this action the plaintiff company claims against the defendant corporation the sum of \$24,159.25, which the plaintiff alleges is the cost of removing

to other locations, replacing and repairing, its gas mains and pipes laid in and under the streets of the City of Toronto, at the request of the defendant corporation for the purpose of enabling certain sewers, pavements, street improvements, subways and other works to be undertaken and constructed.

The plaintiff company was incorporated in the year 1848 by an Act of the Legislative Council and Assembly of the late Province of Canada, 11 Vic., c. 14 (Canada), for the main purpose of supplying the people of the City of Toronto with artificial gas. By the Act of incorporation and subsequent statutes relating to the plaintiff company, it has the right to lay and maintain its gas mains and pipes in and under the streets, squares and public places of the said city.

It is admitted by the defendant corporation that from time to time for the purpose of enabling the city to construct the sewers, pavements and other works set out in the plaintiff's statement of claim, the plaintiff company has removed portions of its mains and pipes to other locations and has replaced destroyed portions of the same and repaired other portions damaged because of the works undertaken by the city. The defendant also admits that prior to 28th March, 1929, it paid to the plaintiff the cost of such removals, replacements and repairs as were made necessary by the works of the defendant.

In the period subsequent to the above mentioned date, the defendant tendered payment to the plaintiff of fifty per cent. of the cost of the labour employed in making the removals, replacements and repairs as aforesaid, but such tenders have been refused by the plaintiff company, it having been agreed between the parties that the plaintiff should do whatever work was rendered necessary by works undertaken by the defendant corporation without prejudice to the contention of the plaintiff company that it was entitled to full compensation for the total cost of the removal and replacement of gas mains and repairs thereto in connection with such works.

With respect to the construction of the subways mentioned in paragraph 7 of the plaintiff's statement of claim, the defendant corporation denies liability to the plaintiff company for the costs of the plaintiff in connection therewith.

The Public Service Works on Highways Act, R.S.O. 1927, ch. 56, by sec. 2, deals with the apportionment of the cost of removal of the appliances or works placed on or under a highway

by an operating corporation, necessitated by the construction, altering or improvement of such highway.

The section reads:

"Subject to the provisions of sec. 3, where in the course of constructing, reconstructing, changing, altering or improving any highway it becomes necessary to take up, remove or change the location of appliances or works placed on or under the highway by an operating corporation, the road authority and the operating corporation may agree upon the apportionment of the cost of labour employed in such work and in default of agreement the cost of such work shall be apportioned equally between the road authority and the operating corporation, but such costs shall not include the replacement or renewal of the appliances or works nor the cost of any materials or supplies, nor any other expense or loss occasioned to the operating corporation."

In this statute, a company distributing electricity for light, heat or power, comes within the definition in sec. 1 of the statute of an operating company, but a company supplying gas is not included therein.

On the 28th March, 1929, Royal assent was given to an Act, 19 Geo. V, c. 19 (Ontario), amending The Public Service Works on Highways Act, and by this amending Act the former subsecs. (a) and (b) of sec. 1 of ch. 56, are repealed and new clauses substituted. By the new subsec. (a), appliances and works "shall include pipes and pipe lines", and the substituted subsec. (b), includes among operating corporations, "those distributing or supplying artificial or natural gas". The statute as amended now appears as ch. 57 of the Revised Statutes of 1937.

It is in pursuance of the amending Act of 1929 that the defendant corporation contends that the plaintiff company has been brought within, and is subject to, the provisions of The Public Service Works on Highways Act since the date of the assent to the amending Act on the 28th March, 1929, and that as a result only fifty per cent. of the cost of labour employed by the plaintiff company upon the various works in connection with which it now seeks compensation for the total cost need be paid by the defendant corporation.

Counsel for the plaintiff has advanced several reasons as to why the plaintiff company should not be held to come within the purview of ch. 56, as amended in the year 1929, and which

is now ch. 57. It is argued that the peculiar provisions of the statutes incorporating, and relating to, the plaintiff company giving it the right to lay down and maintain gas mains under the streets and public places of the City of Toronto; such terms as those relating to the limitation of dividends to ten per cent. per annum; that the shares of the capital stock of the plaintiff company are required to be sold at public auction, and that any surplus of net profit shall, under the circumstances mentioned, be used to reduce the price of gas to consumers of the same, all show that the people of Toronto generally have a definite interest in the conduct and management, and in the matters of accounting and costs, of the plaintiff company, and indicate that the plaintiff company can not be held to be affected by, and must be exempted from, the provisions of a general Act such as The Public Service Works on Highways Act.

In *Johnston and Toronto Type Foundry Co. v. Consumers' Gas Company of Toronto*, [1898] A.C. 447, their Lordships of the Judicial Committee of the Privy Council regarded the incorporating Act of the Gas Company as not an Act of public and general policy but rather in the nature of "a private legislative bargain with a body of undertakers incorporated for purposes which Parliament considers of public or general utility."

Because of the nature and character of the legislation incorporating and relating to the plaintiff company, it is argued that it requires definite and precise language in a public Act to interfere with or disturb in any manner the general purpose and scheme of, and any rights given by, this "private legislative bargain", and that vested rights are not to be taken away by the general language of ch. 56 as amended in 1929.

It is true that sec. 28 of the original Act of incorporation of the plaintiff company states that the Act is declared to be a public Act, and that sec. 10 of the Interpretation Act, now sec. 7 in the Revised Statutes of 1937, states that every Act shall be deemed a public Act unless declared to be a private Act, but whether a statute is public or private, does not depend upon technical considerations as to whether it contains a clause declaring it to be a public Act, but upon the nature and substance of the case: 27 Halsbury, Laws of England, 1st edn. 182.

As was said in the old case of *Dawson v. Paver* (1847), 6 Hare 415, such an Act as was there under consideration was not private legislation but legislation for private purposes.

It is contended on behalf of the plaintiff company that, for the reason that its incorporating Act and amending statutes are legislation for private purposes, the rule of interpretation to the effect that general statutes do not, if couched in general terms, operate to control special rights granted by private statutes which, while conferring special rights have also imposed special obligations, should be applied: 27 Halsbury, Laws of England, 1st edn. 187.

One of the questions which therefore presents itself for consideration, is whether the plaintiff company has special rights of such nature that they cannot be interfered with by The Public Service Works on Highways Act.

Nothing appears in the incorporating Act or other statutes relating to the plaintiff company, requiring the defendant corporation to compensate the plaintiff for the cost of removing and replacing its gas mains and pipes because of the requirements of the defendant corporation in the construction of public works.

In the appeal of *City of Toronto v. Consumers' Gas Company of Toronto* to the Judicial Committee of the Privy Council, [1916] A.C. 618, Lord Shaw, at page 620, said: "Upon whom—the city or the gas company—is the expense of the displacement and replacement of the gas mains to fall?" It was held that the right of the Gas Company to compensation lay in the fact that their pipes and mains fell within the definition of "land" in The Municipal Act and that because those pipes and mains were deemed to be "land", compensation must be made by the city under the provisions of The Municipal Act requiring compensation to be paid to an owner of land where such land is injuriously affected by the exercise of the powers of the city, the measure of compensation being the cost of the operation of displacements and replacements of the gas company's pipes.

At page 621 Lord Shaw said: "In the opinion of their Lordships it is within the right of the city in constructing a drain to order the lowering of the gas main, but it is the duty of the corporation to pay the cost of the operation", and further, at page 622: "In this, as in similar cases, the rights of all parties stand to be measured by the Acts of the Legislature dealing therewith; it is not permissible to have any preferential interpretation or adjustment of rights flowing from statute; all

parties are upon an equal footing in regard to such interpretation and adjustment; the question simply is, what do the Acts provide?"

With reference to this question of compensation, "the rights of all parties stand to be measured by the Acts of the Legislature dealing therewith". I do not think that The Public Service Works on Highways Act can be said to interfere with or control any special right granted to the plaintiff company by its Acts of incorporation. The right of the plaintiff to compensation is not granted by its incorporating Act or Acts, but is given by the Municipal Act because "land" owned by the plaintiff company, viz., its mains and pipes, has from time to time been injuriously affected by something done on the part of the defendant corporation. The right to compensation in such instance, is not a common law right, regarding the common law as distinct from statute law, but arises by virtue of a statute, viz., the Municipal Act. It is with this statutory right to compensation that The Public Service Works on Highways Act purports to deal. To adopt the words of Lord Shaw, the "rights of all parties stand to be measured by the Acts of the Legislature dealing therewith."

Turning now to the second ground taken by the plaintiff company that it is not subject to the terms of the statute in question, it is argued that the word "highway" in the second section of the Act does not embrace or include a city street except under the circumstances mentioned hereafter. The word "highway" is not defined by The Public Service Works on Highways Act.

Argument is advanced by counsel for the plaintiff that the statute in question forms part of a legislative programme or scheme to improve the main highways or roads of the Province, and that the word "highway" must be interpreted, in the light of this legislative scheme, to refer only to main roads connecting urban municipalities with one another, and that "highway" cannot be held to include a street or streets in a village, town or city unless such street or streets should by the circumstances in which it is, or they are, located, form part of a main highway. It is a common rule that statutes made *in pari materia* may be regarded as a whole for purposes of construction, and that with reference to a series of statutes dealing with the same subject matter, it may be presumed that similar language may be similarly interpreted.

There is a series of statutes, of which The Highway Improvement Act, R.S.O. 1927, ch. 54, now ch. 56, is the principal one, which provide generally for the improvement of main connecting highways or roads throughout the Province. The word "highway" is defined in the Highway Improvement Act in sec. 1(e) in almost the same language as the word "highway" is defined in the Municipal Act, sec. 1(e). In The Highway Improvement Act, "highway" shall mean a "common or public highway, and shall include a street or bridge forming part of a highway, or on, over, under or across which a highway passes, or any other structure thereon." In The Municipal Act "highway" shall mean "a common and public highway, and shall include a street and a bridge forming part of a highway, or on, over or across which a highway passes".

It is admitted by the parties to this action "that the removal or change in location of the mains, pipes or other appliances, equipment and works placed on or under the streets and/or bridges of the defendant corporation by the plaintiff was necessitated by reason of works carried on by the defendant on or under the said streets and/or bridges, and the said streets are highways within the meaning of the Municipal Act".

I have not been able to accept the argument advanced on behalf of the plaintiff company that The Public Service Works on Highways Act is one which was passed having for its main object the furtherance of the plan or scheme for the improvement of the connecting main roads throughout the Province, and that it does not relate to municipal matters.

The Public Service Works on Highways Act deals entirely with the right to compensation of an operating company when its appliances or works have to be removed because of a demand made by a "road authority", which term includes a municipal corporation, undertaking the construction or improvement of a highway. It is no doubt apparent that this statute deals with such removals when a main connecting highway is in course of improvement, but the pith and substance of the Act is, in my opinion, the matter of compensation for the cost or expense to which an operating company may be put by a road authority, regardless of whether or not the highway falls within the scheme to improve main connecting highways. This right to compensation exists, as was determined by the Privy Council,

apart from any legislation having for its objects the improvement of the main connecting roads in the Province and has its origin in The Municipal Act. The statute under consideration may be said to be connected with the programme of establishing and improving main roads because of the fact that compensation for the removal of the appliances and works of operating companies may have become necessary in more instances than formerly because of the construction and improvement of main highways. But whether main roads were improved or not, the right to compensation existed in the operating corporation apart from the statutes providing for the improvement of such main roads.

But assuming that The Public Service Works on Highways Act does form one of the series of statutes having for its main object the improvement of the main connecting roads between urban centres, and that the definition of highway in the Highway Improvement Act be adopted, it is proposed by the plaintiff company that the whole definition of the word "highway" in that Act should not be adopted but that for the purposes of The Public Service Works on Highways Act the word "highway" should be confined to the inclusion only of a street or bridge forming part of a highway, thereby restricting the meaning of the word "highway" to that part of a main connecting road between towns or cities which happens to be a street located in an urban municipality, which, on account of its convenient location, may be best situated to form a link to carry a main highway through such municipality.

It is to be again noted that the plaintiff company admits that the streets in Toronto in question are highways under the Municipal Act, but plaintiff's counsel in his argument contends that such streets are to be restricted to those forming part of a main connecting road.

I think that, for the reason already given, The Public Service Works on Highways Act is more closely related to The Municipal Act than it is to that series of statutes providing for the improvement of main roads in the Province, and that the definition of "a highway" in The Municipal Act may properly be adopted in arriving at the meaning of the term "highway" in the Act now being considered. I think that the whole meaning given to the word by sec. 1(e) of the Municipal Act may be considered

as the meaning of "highway" in the Public Service Works on Highways Act.

If the whole definition of highway set out in The Municipal Act or The Highway Improvement Act is adopted, then "highway" includes "a common or public highway". If this is the case, it is necessary to ascertain what is the meaning of "a common or public highway" and determine whether or not such words include the streets in a town or city although such streets may not form part of a main connecting highway.

In *Gooderham v. City of Toronto*, 25 S.C.R. 246, the action was with reference to the right of the City of Toronto to enter upon certain lands which, it was claimed, constituted public streets and highways in the city, placed under the jurisdiction and control of the city by The Municipal Act.

It is to be gathered from the judgment in this case that there is no question but that a street in a city is a public road or highway. Section 442, now sec. 453, of The Municipal Act, sets out the circumstances which must exist in order that a street or road may be deemed a public highway in so far as the municipality is concerned. All highways established under a statute, roads on which public moneys have been expended or statute labour performed, roads dedicated by the owner of the land for public use, shall be common and public highways.

In the case of the *City of Toronto v. Consumers' Gas Company*, in the Court of Appeal, 32 O.L.R. 21, an action which concerned Eastern Avenue in the City of Toronto, that avenue or street was referred to as one of the public highways of the city as was Carlaw Avenue, another street in the said city.

There are a number of cases concerning streets in villages, towns and cities in the Province of Ontario in which the Court has referred to such streets as being common or public highways or roads: *Ricketts v. Village of Markdale*, 31 O.R. 610; *McGregor v. Village of Watford*, 13 O.L.R. 10; *Brown v. City of Toronto*, 36 O.L.R. 189.

My conclusion is that the meaning given to the word "highway" in sec. 2 of The Public Service Works on Highways Act must be such that it includes all the streets of a town or city which fall within the terms of sec. 442 of the Municipal Act and cannot be confined solely to a street which may form part of, or a link, in a main highway connecting urban centres where

such highway runs through a town or city. In such case the plaintiff company is an operating company within the scope of the statute and is subject to the provisions of sec. 2 thereof with respect to such removals, replacements and repairs of the plaintiff's gas pipes and mains as were made necessary because of the construction, reconstruction, changing, altering or improving of a street or streets in the City of Toronto.

The plaintiff company contends that certain of the works enumerated in paragraph 6 of the statement of claim are not referable to the construction, changing, altering or improving of any highway and that in so far as these works are concerned the statute has no application and payment of the total cost of the plaintiff should be made.

The test as to whether or not the provisions of The Public Service Works on Highways Act apply in each individual case where work was done by the plaintiff company is—(1) Had the defendant corporation control of the construction of the public work? and (2) Did such public work consist of the construction, reconstruction, changing, altering or improving of a highway?

There is no dispute respecting the first condition.

The plaintiff holds the view that the work done by it in altering the location of its gas mains to enable the construction of a new bridge by the defendant on Eastern Avenue in the City of Toronto was not rendered necessary because of the construction, alteration or improvement of Eastern Avenue. The old bridge had become obsolete and was too narrow for the volume of traffic passing over it. In the use of this street for continuous traffic along its length a bridge is necessary, and I think it must be held that in constructing a stronger and wider bridge, the highway or street as a whole was improved for the flow of traffic along such street. I also am of the opinion that the bridge must be regarded as an integral part of the highway and that in reconstructing the bridge it must be held that such work was done in the course of reconstructing as well as improving the highway.

With reference to work done by the plaintiff company in order that a sewer might be constructed along Wellesley Street, the plaintiff says that this sewer cannot be held to be an improvement to that street. Mr. Murray Stewart, the principal Assistant Engineer of the Department of Works of the defendant cor-

poration, testified that the sewer in question is a storm water relief sewer. The City of Toronto is provided with what is termed the combined sewage system, that is the ordinary sewers take care of both sanitary needs and surface waters. In order to relieve such sewers from a volume of water too great for their capacity owing to an excess of surface water from the streets a relief sewer may be necessary. It is in order to improve the condition of a street for traffic by enabling surface water to be carried off that a relief sewer is constructed. It is true that the relief sewer may carry water which has been used for sanitary purposes, but its chief and main object is to take care of the volume of water from the surface of the street which, when it enters the ordinary or combined sewer is too great for the capacity of that sewer and the overflow is taken care of by the relief sewer. The relief sewer would not be necessary except for the flow of surface water from the street. I do not think that it can be said that such relief sewer does not constitute a work which acts as an improvement to a street for the purposes of traffic of all kinds, by keeping it free from an excess of surface water.

In 1931 the defendant corporation altered the intersection of Carlton and Yonge Streets so that Carlton Street was widened to the north at this intersection and traffic conditions were thereby improved. This work in my view must be considered as an improvement to the streets at this corner for the purposes of street car, vehicular and pedestrian traffic.

Certain work was done by the plaintiff company with respect to its gas mains due to the construction of a sewer or sewers at Mill Street, part of the Cherry Street Harbour Development system. Apparently a storm and a sanitary sewer were laid in the same trench. If the work done by the plaintiff company would have been made necessary on account of the construction of the sanitary sewer alone, I do not think such work could be said to be related to an improvement in the street or highway itself. But applying the test, this work because of the construction of the storm sewer did constitute a work which improved the condition of the highway.

In 1930 the defendant corporation constructed a retaining wall on the east side of Christie Street. Certain gas mains were relocated by the plaintiff company which contends this wall cannot be said to be an improvement to the street or highway.

The evidence is to the effect that this wall was necessary in order to keep the soil from the bank next to the sidewalk from sliding on to this sidewalk. I think this work had for its object the improvement of the sidewalk for the passage of pedestrians.

Prior to December, 1933, the Toronto Hydro-Electric system installed a brick manhole in Dovercourt Road as part of its works, and in so doing encased the gas main of the plaintiff company in a brick wall. Subsequently a leak developed in this gas main and the plaintiff company was ordered to move the main and repair the leak. I do not think that this work can be held to be related to an improvement in this street and the cost of the plaintiff should be paid.

Changes are at times required to be made in the grade level of certain streets and the work renders necessary the removal or relocation of gas pipes. In my opinion the evidence shows that the regrading of a street has as its object the improvement of the street.

With respect to this branch of the plaintiff's claim for the sum of \$14,584.28 set out in paragraph 6 of the statement of claim: (1) the claim for \$5,793.04 the total cost of work done by the plaintiff in connection with the Eastern Avenue bridge is not allowed, but only so much of this sum as is authorized by sec. 2 of The Public Service Works on Highways Act; (2) the cost to the plaintiff in connection with the Wellesley Street sewer, the widening of Carlton Street, the Mill Street sewers, the retaining wall on Christie Street and the changes in the grade of streets, is to be dealt with according to the statute.

In relation to the Cherry Street system of sewers it was admitted by Mr. Stewart that the sum of \$383.94, part of the charge by the plaintiff company in its statement of claim, was the cost of the plaintiff for work done which was made necessary in connection with sewers which were entirely for sanitary purposes. This amount can therefore not be said to be related to an alteration or improvement in the highway and should be paid to the plaintiff company.

The costs of the plaintiff of the Dovercourt Road work should be paid in full.

The remaining items contained in paragraph 6 of the statement of claim, except that of \$403.83 which relates to water-mains and therefore should be paid in full, were not objected

to by the plaintiff as not being work referable to the construction or improvement of a street or streets. They should be held to come within the statute and the cost of the plaintiff company in respect thereto should be made according to sec. 2 of the Public Service Works on Highways Act.

It is now necessary to consider the claim of the plaintiff company for the sum of \$9,574.97 which represents the cost of removals, replacements and repairs to its gas mains and pipes caused by the construction of certain subways as set out in paragraph 7 of the statement of claim.

On the 9th May, 1924, the Board of Railway Commissioners for Canada upon the application of the defendant corporation, ordered a general scheme of grade separations in the north-western portion of the City of Toronto where the tracks of the Canadian National Railways Company and the Canadian Pacific Railway Company crossed certain of the city streets. The scheme entailed the construction of a number of subways on several of the city streets and certain of these subways were constructed prior to the commencement of work upon the subways which are under consideration in this action.

Pursuant to an order of the Railway Commission, dated 6th November, 1930, made upon the application of the defendant corporation, the Canadian Pacific Railway Company was ordered to proceed with the construction of a subway on Lansdowne Avenue "for the protection, safety and convenience of the public". The plaintiff company was ordered to make such changes as might be necessary in their gas pipes because of the construction of this subway and was ordered to pay the costs of such changes; but the order reads "such payments of the said Gas Company to be without prejudice to its rights, if any, over against the applicant".

On the application of the Canadian National Railways Company, the Railway Commission ordered on the 8th January, 1931, that that company proceed with the construction of a subway under the tracks of the Newmarket subdivision of that railway company on St. Clair Avenue, and, by order dated 8th April, 1931, made on the application of the same railway company, that a second subway be constructed by the same railway company on St. Clair Avenue under its tracks and those of the Canadian Pacific Railway where the tracks of their respective Brampton and Galt subdivisions cross that Avenue. In connec-

tion with these two subways, the plaintiff company is ordered to pay the cost of the removal of its gas pipes, but by a further order, such payments were to be without prejudice to the rights of the Gas Company, if any, over against the defendant corporation.

The question which presents itself for determination is: Has the plaintiff company any right which entitles it to recover from the defendant corporation the cost of the work imposed upon it by the orders of the Railway Commission?

I think, basing my opinion upon the decision of the Privy Council in *Canadian Pacific Railway Company v. Toronto Transportation Commission*, [1930] A.C. 686, and *Bell Telephone Company of Canada Limited v. Canadian National Railway Company* in the Supreme Court of Canada, [1932] S.C.R. 222, affirmed by the Privy Council in [1933] A.C. 562, that the plaintiff company was "interested in or affected by", as contemplated by sec. 39 of The Railway Act, the construction of the subways in question ordered by the Railway Commission to be constructed.

It is true that the question is primarily one of fact, but the Railway Commission found that the subways were necessary.

In *Bell Telephone Co. of Canada v. The Canadian National Railways*, above mentioned, the order of the Railway Commission directing the construction of one of the subways in question in this action was before the Court. The Bell Telephone Company was directed, as was the Gas Company, by the order of the Commission to move such of its facilities as might be affected by the construction of a subway on St. Clair Avenue under the Newmarket branch of the Canadian National Railways. Rinfret J., in delivering the judgment of the majority of the Court, said:

"In the *Toronto Transportation* case, [1930] A.C. 686, the test was laid down in this way: 'The question is . . . whether the company was interested in or affected by the engineering works designed for the removal of the level crossing'. If that test is to be applied here, the answer is plainly in the affirmative. In the present case the alteration of the appellants' facilities is necessitated by the construction orders and they are obviously within the meaning of the statute."

And at page 239 the same learned Judge said:

"The fact that the railway comes across a highway is no doubt the occasion for the order, but the reason or the purpose

of the order is the protection or convenience of the public. All the railway needs is to cross the highway. But there are cases where this may not be done without danger or obstruction. Hence the order to carry the highway over or under the railway. As a result, the utilities are not to be removed in order to allow the railway to pass. They must be removed because for motives of public safety and convenience, the highways are to be lowered or carried above."

Mr. Roland Harris, Commissioner of Works and City Engineer, Toronto, agreed at the conclusion of his evidence to furnish certain information which I have since received. He states that the defendant corporation did not make a demand on the plaintiff company to carry out the removals, replacements and repairs of its pipes and appliances in respect of the construction of the said three subways.

Although the applications to the Railway Commission for the order which authorized the general scheme for the separation of grades at the crossing by the railways at the several streets mentioned in the order, and the subsequent order directing the construction of the Lansdowne Avenue subway, were made by the defendant corporation, on the other hand the applications to the Commission for the orders respecting the construction of the two St. Clair Avenue subways were made by the Canadian National Railway. I do not think that the question whether it was, or was not, the defendant corporation which applied to the Railway Commission affects the issue. The powers of the Railway Commission may be set in motion by a railway company, a municipal corporation or any person aggrieved. The primary concern of Parliament in the enactment of the Railway Act is the public welfare: *Bell Telephone Company of Canada, Limited v. The Canadian National Railway*, p. 229. Under said sec. 39 of the Railway Act the Railway Commission had power to make such provision as it deemed necessary with reference to the cost of the work ordered to be done by the respective companies and other parties interested or affected. The changing and relocation of the gas pipes and mains were carried out by the plaintiff company, not because the defendant corporation ordered or demanded such work to be done, but because the Railway Commission ordered it to be done. In my view it cannot be said, under such circumstances,

that the plaintiff company is entitled to compensation from the defendant corporation for the reason that its pipes were injuriously affected by a work or works undertaken and carried out by the defendant corporation and that thereby the plaintiff became entitled to compensation under the provisions of The Municipal Act in accordance with the principle laid down in *Consumers' Gas Company v. The City of Toronto* above referred to.

In order that the provisions of The Public Service Works on Highways Act may become operative, it is necessary that the road authority (which is the defendant corporation) must have control of the construction or improvement of a highway, and in the course of such construction or improvement finds it necessary that gas pipes or mains of an operating company be removed or changed with respect to their location. The defendant corporation did not have control of the construction of the subways.

My conclusion is that the plaintiff company has no right which it can enforce as against the defendant corporation to recover the cost of changes made in its pipes under the orders of the Railway Commission, and that therefore it is not entitled to the sum of \$9,574.97 claimed against the defendant corporation in respect to the cost of such work.

With regard to those items set out in paragraph 6 of the statement of claim, if any, with reference to which the parties cannot agree on the amount of the cost of labour entailed by the plaintiff, there should be a reference to the Master to fix the amount.

The defendant corporation should have the costs of the action.

The plaintiff appealed to the Court of Appeal from the judgment of Hogg J.

September 11th, 12th and 13th, 1940. The appeal was heard by ROBERTSON C.J.O., MIDDLETON and FISHER JJ.A.

W. N. Tilley, K.C., and *J. L. Wilson*, K.C., for the plaintiff, appellant.

F. A. A. Campbell, K.C., for the defendant, respondent.

October 17th, 1940. The judgment of the Court was delivered by ROBERTSON C.J.O.:—An appeal from the judgment of

Hogg J. of the 26th March, 1940, after the trial of the action before him without a jury at Toronto.

The action was brought to recover from the defendant two sums of \$14,584.28 and \$9,574.97, with interest, the first of these sums being the cost to which the plaintiff had been put by the removal to other locations of portions of its mains and pipes, and for replacing other portions destroyed, and for repairing still other portions that were damaged, all necessary for the purpose of enabling the City Corporation to do certain works upon the streets where the mains and pipes were laid; and the sum secondly mentioned being the cost to the plaintiff of removals, replacements and repairs to its mains and pipes made necessary by the construction of certain subways under orders of The Board of Railway Commissioners.

The trial Judge awarded appellant \$5,264.36 in respect of the first-mentioned claim and dismissed the secondly-mentioned claim.

I agree with the conclusion arrived at by the learned trial Judge as to the question mainly in dispute, namely, that The Public Service Works on Highways Act—first enacted in its present form in 1929, and now found in R.S.O. 1937, ch. 57—fixes the basis for computing the compensation to be paid by the respondent to the appellant “where in the course of constructing, reconstructing, changing, altering or improving” any of respondent’s streets “it becomes necessary to take up, remove, or change the location of” any of appellant’s pipes or pipe lines placed on or under the streets.

One approaches the consideration of the case with some sympathy with appellant in its contention that the statute referred to, as applied by the judgment in this case, does appellant injustice, and that, if possible, the Court should find some construction of the statute that will not prevent appellant from recovering compensation to the full extent of any injury it suffers by reason of the acts of respondent. Such compensation as is provided by sec. 347 of The Municipal Act, R.S.O. 1937, ch. 266, has been generally considered, both here and in other jurisdictions, as nothing more than fair and just, and it has been available to appellant, if not ever since its incorporation in 1848, at least since 1873 (see 36 Vic., ch. 48, sec. 373), and in case of expropriation since 1849 (see 12 Vic., ch. 81, sec. 195). Such compensation is still available generally to persons whose lands are expropriated

or injuriously affected by works done for the public benefit. The circumstance that the statute in question is expressly confined to cases where the injury is done in the course of constructing, re-constructing, changing, altering or improving a highway and does not apply to limit the full compensation available to appellant when similar injury is done by other works of respondent, as, for example, the laying of a sewer, may also give rise to a doubt whether in truth the draftsman of the statute had present to his mind any such case as that of appellant. The terms of the statute itself are, however, in my opinion, so plain and unambiguous that it is impossible that a Court should do otherwise than give effect to them in their natural and ordinary sense, rejecting the several submissions of the appellant both as to the proper interpretation of the statute and as to its application to the appellant. Reference may be made to the recent judgment of the Supreme Court of Canada in *Dufferin Paving and Crushed Stone Limited v. Anger*, [1940] S.C.R. 174, where the principle that I think must govern the present case is stated and applied. Apparently the Legislature considered that adequate provision for circumstances such as may exist here was made by sec. 3 of the Act.

In my opinion, unless its meaning is affected by context or association or definition, "highway" means, in its common use, a public road or way open equally to everyone for travel, and includes the public streets of an urban district equally with connecting roads between urban districts. I am unable to think of any other word that is so commonly used to include all such roads. See sec. 453 of The Municipal Act.

I am further of opinion that this broad meaning of the word "highway" in the Act in question is not limited either by anything contained in the Act itself or by the terms of any other Act or Acts with which appellant contends this Act is to be read and construed as part of one legislative scheme. The principal Act of the series of Acts that appellant contends must be read together is The Highway Improvement Act, R.S.O. 1937, ch. 56. But not only is the word "highway" given a broad interpretation by express provision of the last mentioned Act (sec. 1(e)) but certain of its provisions specifically relate to streets in urban districts—see sec. 29 and sec. 66, subsec. 3. Counsel for appellant in the course of his argument was not prepared to adopt a construction of The Public Service Works on Highways Act

that would confine its operation to highways upon which work is done under The Highway Improvement Act, and in this I have no doubt that he was right, for the omission of any such words of limitation is such an obvious one that it is impossible to assume that the Legislature overlooked the need of them. Short of such a limitation as that suggested I am unable to see what restriction would be placed upon the general terms of the first-mentioned Act (ch. 57) by reading it with the latter Act (ch. 56) as part of one legislative scheme.

Appellant further submitted that even if the word "highway" in this statute includes the public streets of a city, it should not be construed as retroactive or as affecting appellant's vested rights in respect of pipes already laid.

It seems to me that this argument is based upon a false assumption of what it is that the Act does affect. Doubtless appellant has vested rights in its pipes and mains, and also in the soil where they are laid pursuant to its Act of incorporation. Appellant concedes, however, that respondent has the right to require the removal and re-location of appellant's pipes when that becomes necessary in the course of work on the streets. The rights of the parties in that regard would seem to be definitely settled by the decision of the Judicial Committee in *Toronto Corporation v. Consumers' Gas Co.*, [1916] 2 A.C. 618, where it was also held that appellant became entitled to compensation under what is now sec. 347 of The Municipal Act, R.S.O. 1937, ch. 266. It is this right to compensation that is affected by the Act now in question, and not the right of appellant to place and maintain its pipes on or under the streets. The right to compensation does not accrue and is not a vested right until respondent has expropriated or injuriously affected "land" of the appellant, as "land" is interpreted by sec. 1(g) of The Municipal Act.

Appellant further submits that even if the statute in question must be given the broad interpretation placed upon it by the judgment in appeal, the appellant should be excluded from its application because of the special character of its relations with respondent. It is argued that appellant's Act of incorporation is in essence a private bargain between appellant and respondent sanctioned by the Legislature, and that this bargain is not to be deemed to be altered by general legislation.

The difficulty with this submission is that there seems no substantial foundation for it. Not only is there nothing in appel-

lant's Act of incorporation referring to any bargain or agreement with the municipality, or even to state that respondent had in any formal way assented to its terms, but the Act contained the following proviso in sec. 20:

"Nothing in this Act contained shall extend or be construed to extend . . . or to prevent the Legislature of this Province at any time hereafter from altering, modifying or repealing the powers, privileges or authorities hereinbefore granted to the said Company or from incorporating any other company for like purposes."

It is further to be noted that whatever may have been appellant's rights in respect to its mains and pipes while placed in the soil of respondent's streets its right to compensation for their expropriation or injurious affection has always rested upon the compensation provisions of The Municipal Act, and not upon any provision of the Act of incorporation. There is, therefore, no alteration of the terms of appellant's bargain with respondent—if there was a bargain—when the Legislature, by another general Act, modifies, in certain cases that affect appellant, the statutory right to compensation given by The Municipal Act. That right was not a subject of bargain.

More than once in the course of his argument counsel for appellant stated that respondent had deprived appellant of its "land", but had not taken proceedings to expropriate it under The Municipal Act. There is no complaint of this character in the statement of claim, and so far as I am aware appellant's counsel made no claim by way of damages instead of compensation, such as would be appropriate to a wrongful act. In any event it would seem that there is no foundation for a complaint of that nature in the facts of this case. A regular system of co-operation had been developed between the parties. When respondent proposed to do any work on any of its streets that would affect appellant's mains or pipes laid there, respondent notified appellant and appellant thereupon by its own workmen did whatever was required to be done and rendered its account to respondent. In many cases the pipes that had been in the ground were simply left there because it would cost more to dig them out than they were worth. Whether title to the old pipes and in the "land" occupied by the old pipes thereupon vested in respondent, it is not necessary to determine. Whatever may have been the result in that regard when appellant ac-

cepted a new location for the old one, there is no question of wrongful taking involved in this action.

While I agree with the learned trial Judge in his conclusion that appellant's right to compensation is governed by The Public Service Works on Highways Act, when respondent's operations are of the character described in that statute, I am of the opinion that the statute can be applied only in cases where, in undertaking the work that has made it necessary to take up, remove or change appellant's mains or pipes, the respondent has proceeded in the exercise of its powers to construct, reconstruct, change, alter or improve a highway. I do not think the construction of a sewer, whether for sanitary purposes or for surface drainage, comes within that description, even if incidentally it does effect some improvement in the highway. It is common knowledge that when intended to carry surface water only, a sewer usually has connections for surface drainage with the private properties that front on the street, and in many cases carries as well the surface water from other streets than that upon which it is laid.

With respect to the item for work at the Eastern Avenue bridge over the Don River, I find difficulty in forming an opinion in regard to it in the absence of more definite information regarding respondent's bridge. A bridge is not necessarily part of the highway. It may have been built, not on an allowance for road, but to connect two highways ending respectively on the opposite sides of a river or ravine, and perhaps originally in different municipalities. Section 1(b) of The Municipal Act distinctly recognizes that there may be public bridges that are not within the definition of a highway in clause (f) of the same section. See also secs. 452, 455 and 480 of The Municipal Act. It is possible, therefore, that the re-building of this bridge was not work upon a highway and did not come within the terms of The Public Service Works on Highways Act. As the item is a substantial one it is not desirable that it should be finally disposed of without adequate information as to the essential facts, and we reserve leave to either party to speak to the matter before final settlement of the order.

With respect to the cost incurred by appellant in executing work directed by The Board of Railway Commissioners of Canada, and which that Board ordered appellant to bear, I agree

with the learned trial Judge that respondent is not liable to reimburse appellant.

If, with these general directions, the parties are not able, in settling the order, to make necessary adjustments in the amount to be paid, the matter may be spoken to.

There remains to be dealt with the question of the costs of action. The learned trial Judge ordered appellant to pay respondent's costs, although appellant recovered judgment for a substantial sum, no part of which had been paid into Court. There was in fact no proper plea of tender before action and no money was paid into Court by respondent. In these circumstances the appellant cannot properly be made to pay costs, and the judgment must be varied by striking out the order for costs. As appellant failed on the most substantial issue the question of costs will be fairly disposed of if no costs are awarded to either party. A similar disposition is made of the costs of appeal.

Order accordingly.

[COURT OF APPEAL.]

Corporation of the Township of Rochester v. Corporation of the Township of Tilbury West.

Municipal Corporations—Drainage—Report of engineer as to repair of drain—Necessity for obtaining leave from Drainage Referee—The Municipal Drainage Act, R.S.O. 1937, ch. 278, secs. 71, 72, 73, 74 and 75.

Section 75 of The Municipal Drainage Act, R.S.O. 1937, ch. 278, does not apply when an engineer is proceeding, under any one of secs. 71, 72 or 73 of the said Act, to report upon the repair of a drain. The wide provisions of secs. 71, 72, 73 and 74 of the said Act are not controlled by sec. 75 and the original assessment is subject to variation by an engineer when reporting on the repair of the drain without first obtaining leave from the Drainage Referee, but always subject to appeal as provided in sec. 74: *Re Chatham and Dover* (1904), 7 O.L.R. 132, distinguished.

Under sec. 72 of the Act, maintenance of drainage work which is continued in or through one or more municipalities, is to be at the expense of the lands and roads in any way assessed for the construction thereof, and in the proportion determined by the engineer or surveyor in his report and assessment for the original construction, or in appeal therefrom by the award of the arbitrators or order of the referee, unless and until in the case of each municipality such provision for maintenance is varied or otherwise determined by an engineer in his report and assessment for the maintenance of the drainage work, or in appeal therefrom by the order of the referee. There is no authority in interpreting sec. 72 for relieving lands and roads from all liability for assessment for maintenance of drainage work merely because they lie below and in a different municipality from the location of the work of repair.

AN appeal by the Corporation of The Township of Rochester from an order of J. A. McNevin, K.C., The Drainage Referee, dismissing an appeal to him by the appellant Township from a report of an engineer respecting a drain known as the Alexander Drain.

November, 6th and 7th, 1940. The appeal was heard by ROBERTSON C.J.O., FISHER and GILLANDERS JJ.A.

J. H. Rodd, K.C., for the Township of Rochester, appellant.

H. E. Grosch, K.C., for the Township of Tilbury West, respondent.

December 4th, 1940. ROBERTSON C.J.O.:—An appeal from an order of the Drainage Referee dismissing an appeal by the appellant from the report of J. J. Newman, the engineer appointed by the respondent's Council to make an examination and report on the repair of the Alexander drain.

I have had the privilege of reading the reasons for judgment of Gillanders J.A., and I agree with him.

The report in question was made under sec. 72 of The Municipal Drainage Act, R.S.O. 1937, ch. 278. An appeal to the

referee is provided by sec. 74 and may be made on three grounds, (1) that the amount assessed against lands and roads in the appellant municipality is excessive, (2) that the work provided for in the by-law provisionally adopted is unnecessary, or (3) that such drainage work has never been completed, through the default or neglect of the municipality whose duty it was to do the work.

The notice of appeal to the referee states the grounds of appeal as follows:

"1. That the said engineer in the said report has made no assessment upon the lands and roads in the Township of Rochester, but has wrongfully attempted to make an assessment against the Township at large.

"2. That the Township of Rochester has just completed the improvement of that portion of the drain in question situate within its limits and benefitting the only lands in the said Township assessable for any of the said work, and the report of James S. Laird, referred to in the said report, is no longer applicable to the drainage work.

"3. That no lands or roads in the said Township of Rochester are in any way benefitted by the work proposed to be done under the said report and no assessment could be made against them under the said report, and if by inference any of the said lands have been assessed, then the same is illegal and unjust."

The grounds of appeal so stated cannot be regarded as coming within any but the first of the statutory grounds, that is, that the amount assessed against lands and roads in appellant municipality is excessive. It is difficult to bring the ground first stated in the notice of appeal under even that head, for it is not that the amount assessed against lands and roads is excessive, but that no assessment at all is made upon lands and roads in appellant municipality, and an assessment against the Township at large has been attempted. If that were in fact what the engineer by his report attempted to do, it would probably be illegal and ineffective, but I do not think the engineer intended to do anything of the kind. It is a matter of interpretation of the report. A report upon the repair and improvement of the Alexander drain was made by James S. Laird, C.E., in May, 1912, and the Laird report assessed lands and roads in appellant Township with 13.69 per cent. of the total cost. Laird's report is referred to in the present Newman report, and when

Newman comes to deal with the Township of Rochester's share of the cost of the work he recommends, his report states that "upon the report of Jas. S. Laird, C.E., above referred to, the Township of Rochester was assessed 13.69 per cent. of the total cost," and he then proceeds to deduct the same percentage from the total cost of the work now contemplated, to determine the amount to be borne by lands and roads in Tilbury West, and he says the percentage so deducted should be contributed by the Township of Rochester. It seems to me to be quite plain that the meaning is that the 13.69 per cent. of the total cost to be contributed by the Township of Rochester of the present work is an amount to be raised by assessment upon lands and roads in that Township, as in the Laird report. It is in that sense he speaks when he says that the Township of Rochester was assessed 13.69 per cent. of the total cost by the Laird report, and it is in the same sense and in no other that the present assessment of the Township of Rochester is made.

The two other grounds stated in the notice of appeal to the referee relate definitely to the liability of lands and roads in the Township of Rochester to assessment and to the amount assessed. These grounds of appeal require some consideration of the relevant provisions of the Drainage Act and some statement of the past history of this drain. The Alexander drain is an old drain and any by-law and engineer's report under which it was originally constructed are lost. The original Laird report upon the repair and improvement of the drain made in 1912 is also lost, but what is admitted to be a copy of it is available. Section 72 of the Act provides that the drain shall be maintained at the expense of the lands and roads in any way assessed for the construction thereof, and in the proportion determined by the engineer or surveyor in his report and assessment for the original construction, or in appeal therefrom by the award of the arbitrators or order of the referee, unless and until, in the case of each municipality, such provision for maintenance is varied or otherwise determined by an engineer or surveyor in his report and assessment for the maintenance of the drainage work, or in appeal therefrom by the order of the referee. Whether the assessment for repair and improvement made by the Laird report was on the same basis as the assessment made for the cost of original construction is not known, but I think it is proper to presume either that the Laird assessment was

the same as the original assessment, or, if it varied the original assessment, that it was varied under proper authority. The maxim *omnia praesumuntur rite esse acta* should be applied: *Palmatier v. McKibbon* (1894), 21 A.R. 441. Subject to what is next hereinafter stated, the cost of the present work is, therefore, to be borne in the same proportions as were applied in the Laird report, either because the Laird assessment was the same as the assessment for the cost of the original work, or because the original assessment was properly varied by Laird in his report. There is no suggestion of an appeal from Laird's report. It is, however, to be noted that by the express terms of sec. 72 the provision for maintenance may be "varied or otherwise determined by an engineer or surveyor in his report and assessment for the maintenance of the drainage work or in appeal therefrom by the order of the Referee." Not only, therefore, may the assessment as made by the Laird report have been varied since by some later report or on appeal from such later report, but also, as I read sec. 72, Newman by his present report, on proper grounds, might vary a former assessment, or the referee, on appeal to him, might do so.

It seems to have been generally assumed throughout this case that any power to vary the assessment an engineer may have under either secs. 71, 72 or 73 of the Act, when reporting on the repair of a drain, is always subject to the provisions of sec. 75. That section requires, in the cases to which it applies, that before the original assessment is changed, permission of the referee shall first be obtained on the application of a municipality liable for contribution to the drainage work. I do not think sec. 75 has any application when an engineer is proceeding under any one of the secs. 71, 72 or 73 to report upon the repair of the drain. No doubt some such effect was given to the section which the present sec. 75 has replaced—see *Re Chatham and Dover* (1904), 7 O.L.R. 132. The relevant section when that case was decided was sec. 72, R.S.O. 1897, ch. 226. Subsection 1 of that section began with these words "The Council of any municipality liable for the maintenance of any drainage work *may from time to time as the same requires repairs* vary the proportions of assessment for maintenance." The subsection then proceeded to provide for obtaining a report and assessment by an engineer, but contained this restriction "but he shall not, except after leave given by the referee on an application of

which notice has been given to the head of every municipality affected, assess for such repairs any lands or roads lying in any municipality into which water flows through the drainage work from the municipality undertaking the repairs."

It was held in *Re Chatham and Dover* that this old sec. 72 restricted the power of the engineer to vary the original assessment that otherwise seemed plainly to be conferred upon him by the sections that are now secs. 71, 72 and 73.

In 1916 the former subsec. 1 of sec. 72, which in the meantime had become subsec. 1 of sec. 75, R.S.O. 1914, ch. 198, was repealed by 6 Geo. V, ch. 43, sec. 5, and the new subsection was amended in 1920 by 10-11 Geo. V, ch. 67, sec. 7, when subsec. 1 of sec. 75 assumed its present form. It now begins in this way, "The Council of any municipality, liable for contribution to a drainage work in connection with which conditions have changed or circumstances have arisen such as to justify a variation of the original assessment in respect of the drainage work, may apply to the referee."

It will be seen that the subsection, as it was when *Re Chatham and Dover* was decided, by its express terms was applicable to a drainage work "from time to time as the same requires repairs." The subsection therefore applied whenever repairs were to be done under any of the sections that are now secs. 71, 72 and 73. The present subsec. 1 of sec. 75 is not tied up by any words to an occasion when the drain requires repairs. The only requirement for its application is that "conditions have changed or circumstances have arisen such as to justify a variation of the original assessment." By subsec. 5 of the present section it is provided that "such assessment as so varied shall thereafter, unless or until it is further varied, form the basis of any assessment for maintenance of the drainage work affected thereby." This subsection is new since the decision in *Re Chatham and Dover*.

In my opinion the wide provisions of secs. 71, 72, 73 and 74 of the Act are not controlled by sec. 75, and the original assessment is subject to variation by an engineer when reporting on the repair of the drain without first obtaining leave from the referee, but always subject to appeal as provided in sec. 74.

There have been two engineers' reports on maintenance of the drain since the Laird report. The first was a report by Newman in 1922, and the assessment made by this report varied

that made by the Laird report, but the proportion of the cost that it assessed to Rochester was a greater percentage than 13.69. There was another report on maintenance by C. B. Allison, O.L.S., in 1938, and the assessment made by his report differed from both the Laird assessment and the Newman assessment of 1922, and apportioned to Rochester a greater percentage of the cost of the work it provided for than either of the two earlier reports on maintenance. It should be stated that the Newman report of 1922 was confined to repairs to be made within Tilbury West, and the Allison report of 1938 was confined to repairs to be made within Rochester, but in each case lands and roads in both Townships were assessed for a share of the cost of the work. That is in accordance with the provisions of sec. 72, which expressly provides for the maintenance by each municipality of that part of the drain within its boundaries, but at the cost of all who were liable for the original construction.

Whether or not the variations in the assessment made by either Newman's report of 1922 or Allison's report of 1938 were validly made, it is obviously of no assistance to appellant on the present appeal to cite them as variations of the Laird assessment, or of the assessment for the original cost of the drain, that are to be followed in future assessments instead of the assessment found in the Laird report, for in each case the variation increases appellant's proportion of the cost.

What appellant urges is that it having in 1938 in respect of the repairs then done in Rochester under the Allison report borne a greater proportion of the total cost of the repairs than was apportioned to Rochester in respect of the repair of the whole drain under the Laird report, equity requires that now that repairs are to be made on that part of the drain wholly within Tilbury West, account should be taken of the increased proportion that Rochester bore in 1938, and the proportion of Tilbury West should now in turn be increased, and Rochester should have its proportion correspondingly reduced to a percentage below that fixed by Laird's report. Otherwise, it is argued, Rochester, on the repair of the whole drain, pays an increased proportion of the cost of repairs beyond what was assessed to it by Laird.

I do not think the matter can be dealt with in that way. We must take it that whatever Rochester paid under the Allison report of 1938 was a proper assessment in respect of the work

then done, and if the apportionment to Rochester made by the Laird report for its share of the cost of repairs was increased, there was some good reason for it. We cannot turn the present appeal into an appeal from Allison's report. An increase in Rochester's percentage of the cost of doing the work done in Rochester in 1938 is not in itself any reason for decreasing its percentage of the cost of repairing any other part of the drain. If Rochester's percentage of the cost now to be assessed is to be reduced, it must be on some ground that makes the Laird apportionment unfair or inequitable, having regard to the work now to be done. No such ground has been shown.

If it were evident that the referee had dismissed the appeal on the short ground that there could be no variation of the Laird assessment except after leave given by him under sec. 75, it might be proper to refer the appeal back to him to consider whether or not there was any substantial ground for complaining of the assessment under present conditions. The amount involved under Newman's report of 1939 is, however, so small that the expense of a reference back would not be warranted unless it clearly appeared that some wrong course had been taken. I agree with the disposition of the appeal as stated by Gillanders J.A.

GILLANDERS J.A.:—This is an appeal by the Corporation of the Township of Rochester from an order of the Drainage Referee, J. A. McNevin, Esquire, K.C., dismissing an appeal to him by the appellant Township from a report of an engineer respecting the Alexander drain. This drain, originating on the southern boundary of the respondent Township, flows a considerable distance northerly along the Township line between the appellant and respondent municipalities (but on the respondent's side of the road) and then turns for a shorter distance through lands in the appellant township in a north-westerly direction finding its outlet in the Ruscombe River. It is agreed that the drain was originally constructed under statutory authority, but the report or by-law in connection with the work cannot be found. However in 1912 a work of improvement and repair was done under a report made by James S. Laird, C.E. In and by this report assessment was made on the lands and roads affected by this work of improvement in both municipalities. The original of this report is apparently lost, but a copy is produced and

accepted as correct by counsel for both parties. This report, as stated, provides for a work of improvement. It describes the lands and roads in both townships liable to be assessed in respect of the work and makes a complete assessment thereon. The legality of this report and the assessment thereby made is not attacked.

In 1922 a report was made by J. J. Newman, O.L.S., providing for the construction of certain bridges in the respondent Township, and the provision of certain moneys owing by the drainage scheme to the respondent municipality. The assessment in this report is not based on the Laird report and it is said there is no authority to make any variation. However, it appears that following negotiations between the municipalities an agreement was arrived at, reducing somewhat the amount assessed against lands in the appellant Township.

In 1938 on instructions from the Council of the appellant Township, a report was made by C. B. Allison, O.L.S., respecting certain work of repair and maintenance within the limits of the appellant Township. This report provided for assessing the cost of this work on lands and roads of both Townships in accordance with the schedule to the report. This assessment is not based on either that in the Laird report of 1912, or the Newman report of 1922, and it is said again there was no proper authority to make a new assessment. An appeal from this report was launched by the respondent Township and this was settled by an agreement in writing, by which the assessment on lands in the respondent Township was reduced.

Following instructions from the council of the respondent Township, Mr. J. J. Newman, O.L.S., made the report in question in this appeal, dated March 29th, 1939, which provides for certain work of maintenance and repair to the drain and a branch thereof. The estimated cost of the work recommended, together with compensation to certain land owners as damages to lands and crops, with all incidental expenses, and an amount owing to the respondent Township (the inclusion of which was not questioned on the appeal) was \$4,207.00. In his instructions from the respondent Township the engineer had been authorized to vary the assessments as he deemed necessary, but the making of the report was not prefaced by an application to the Referee under sec. 75 of the Act. Early in the report under appeal, it is stated:

"I find that this drain and branch were last improved under a report made by James S. Laird, C.E., dated May 23rd, 1912," and later, after showing how the total cost is made up, the report provides:

"Under the report of James S. Laird, C.E., above referred to, the Township of Rochester was assessed 13.69 per cent. of the total cost of improving the drain and as the by-law adopting the above mentioned report is the basis of maintenance of the whole drainage work, I have deducted this amount, viz., \$576 (which should be contributed by the Township of Rochester) before making the assessment on your lands and roads." The engineer then proceeds to assess the balance of the cost against the lands and roads of the respondent Township in the manner set out in detail in the report. No new assessment was made, nor was any schedule prepared showing how the amount to be paid by the appellant Township was to be raised, other than by the reference to the assessments in the Laird report.

From this report the appellant Township appealed to the Referee on three grounds, briefly stated as follows:

1. That no assessment was made upon the lands and roads in the appellant Township, but that the engineer wrongfully attempted to make an assessment against the Township at large.

2. That the appellant Township, having just completed (under the Allison report of 1938) work situate within its limits and benefitting the only lands in the Township assessable for such work, the Laird report is no longer applicable.

3. That no lands and roads in the appellant Township are benefitted and that no assessment could be made against them, and if any assessment has been made, it is illegal and unjust.

The learned Referee dismissed the appeal, holding that the engineer was not obligated to make a new assessment on lands and roads in the appellant municipality, and that the Laird report is still applicable as a basis of assessment for maintenance.

From this decision the appellant Township appeals to this Court.

Pursuant to sec. 74 a municipality liable to contribute a portion of the cost of repairs to a drainage work may, as provided therein, appeal to "the Referee on the ground that the amount assessed against the lands and roads in such municipality is excessive or that the work provided for in the by-law

is unnecessary, or that such drainage work has never been completed through the default or neglect of the municipality whose duty it was to do the work, in the manner provided in the case of the construction of the drainage work, and the Referee on such appeal may alter, amend or confirm such by-law, or may direct that the same shall not be passed as to him may seem just, and his order upon such appeal shall be subject to appeal to the Court of Appeal."

Of the grounds of appeal permitted by the section the only one applicable to the present case is "that the amount assessed against the lands and roads in such municipality is excessive."

Mr. Rodd, in his argument, made various submissions. First and mainly he contended that because, with the exception of a very short portion of Township road, the proposed work of maintenance is to be done wholly within and upon lands and roads in and over which the respondent Township has jurisdiction, and because with the exception of the small portion of roadway mentioned, the lands and roads in the appellant Township lie below those of the respondent, they should be assessed for no part of the cost of the present work. He contends that the lands of the appellant Township receive no benefit from this work of maintenance, but that it is wholly for the benefit of the lands lying above and that on a proper construction of sec. 72 of The Municipal Drainage Act such work of maintenance and repair is not only to be done by each municipality within its own boundaries but the cost of such work within the boundaries of such municipality is to be borne by the lands and roads in such municipality alone, and not the drainage area as a whole. With this contention I am unable to accede.

Under sec. 72 of the Act maintenance of drainage work which is continued in or through more than one municipality, is to be "at the expense of the lands and roads in any way assessed for the construction thereof and in the proportion determined by the engineer or surveyor in his report and assessment for the original construction or in appeal therefrom by the award of the arbitrators or order of the referee, unless and until, in the case of each municipality, such provision for maintenance is varied or otherwise determined by an engineer or surveyor in his report and assessment for the maintenance of the drainage work, or in appeal therefrom by order of the Referee."

In this case the lands and roads of the appellant Township should bear whatever proportion of the cost of maintenance is assessed against them either in the original report or as varied or determined by the engineer or in appeal by order of the referee. I can find no authority for relieving such lands and roads from all liability for assessment for maintenance merely because they lie below the location of the work of repair. The engineer here has adopted the assessment in the Laird report. The appellant has not, in my opinion, shown that the amount so assessed against its lands and roads is excessive.

It is pointed out that the report purports to vary the assessments on lands and roads within the respondent Township. Whatever might be urged by owners affected, before a Court of Revision or on an appeal therefrom to the County Judge under sec. 44 of the Act, we are concerned only with the assessment as between municipalities.

It is suggested that in any event the report makes no assessment against the lands and roads affected in the appellant Township, but merely charges a lump sum against the appellant Township at large, and is therefore invalid. I confess that at the outset I questioned whether or not the report should not have provided a schedule showing how the sum of \$576 should be charged against lands and roads affected, but on consideration can find no justification for so holding. In *Re Jenkins and Township of Enniskillen* (1894), 25 O.R. 399, at page 404, Mr. Justice Street said: "The aggregate of the sums charged against the various lands benefitted in each municipality form the total charge against that municipality." I think, therefore, while the wording in the report under consideration might have indicated clearly that the sum of \$576 was an assessment against the lands and roads affected in or under the jurisdiction of the appellant Township, that the wording is sufficient, and the sum charged to the appellant Township should be interpreted as an assessment against the lands affected.

Mr. George A. McCubben, a drainage engineer of long experience, who gave evidence before the Referee on behalf of the respondent, on being asked whether or not he would have detailed in the report any assessment so far as the appellant Township is concerned, states that he would not and had never done it under similar circumstances. The report relied upon, as it might have been amended by the Court of Revision or

the County Judge, is within the custody of the Township Clerk and it is pointed out that the Township Clerk is competent to make the pro rata division within his own municipality. Finding nothing in the statute to conflict with the practice as stated, I think the report in question is not open to attack on that ground.

It was pointed out to the Court that since the Laird report the larger part of the town-line has been taken over by the County of Essex, is now a county road, and the assessment thereon should not be included in the proportion charged to the appellant Township, and that therefore the amount charged the appellant is unjust and excessive.

By sec. 1(h) of the Act "municipality" does not include a county municipality except as an owner within the meaning of clause (i) of that section. Section 21 gives authority to the council of a municipality after petition to pass by-laws providing for construction, for borrowing funds, and, under subsec. 3 thereof, for assessing and levying upon lands and roads to be benefitted, and "including roads held by . . . counties or county councils." Under sec. 66 I see no difficulty in the appellant assessing the owners affected, including the county corporation, if it is responsible, and levying on the lands and roads included in the Laird report for the amount required to be raised.

In the result, I think the appeal should be dismissed with costs.

FISHER J.A. agreed with Gillanders J.A.

Appeal dismissed with costs.

[COURT OF APPEAL.]

Corporation of the County of Welland v. Corporation of the Township of Stamford.

Municipal Corporations—Assessment and taxation—County rates—Area of land transferred from defendant Township to a City pursuant to an order of The Ontario Municipal Board—County levy based on assessments made by Township prior to transfer of area to City—Right of County to recover from Township—The Assessment Act, R.S.O. 1937, ch. 272, secs. 89 to 98.

The plaintiff County brought this action against the defendant Township to recover unpaid balances alleged to be owing and unpaid in respect of the sums directed by the County to be levied in the Township as its portion of the County rate in the years 1934, 1935, 1936, 1937 and 1938.

The dispute between the parties resulted from an order of The Ontario Municipal Board, dated May 5th, 1933, and effective as of December 31st, 1933, made under sec. 20 of The Municipal Act, R.S.O. 1927, ch. 233, whereby certain lands in the Township were annexed to the City of Niagara Falls. Notwithstanding the order of the Ontario Municipal Board the lands in question continued to be assessed in the Township rolls, and in fixing the Township's share of the County rate for 1934 and subsequent years the County Council gave no effect to the annexation to the City of Niagara Falls of these lands.

The Township contended that the County, beginning with the year 1934, should have omitted the amount of the assessment of these lands from the total assessment of the Township in levying the County rate.

Held, having regard to the imperative provisions of secs. 89 to 98 of The Assessment Act, R.S.O. 1937, ch. 272, dealing with the levying of County rates, that the County proceeded as the Act directs in the years 1934 and 1935 in making the assessments of property in the Township rolls, made respectively in the years 1932 and 1933 and equalized in 1933 and 1934, the basis upon which to apportion and levy the County rate for 1934 and 1935, and it could not have levied the rate lawfully by any other procedure. Therefore the County is entitled to recover from the Township the latter's share of the County rates for the years 1934 and 1935.

Although after December 31st, 1933, when the order of the Ontario Municipal Board became effective, the Township assessor continued to include the lands that had ceased to form part of the Township in the assessment roll, there was no legal justification for it and it can be given no effect. Hence as to levies made after 1935 the County is not entitled to recover.

AN action by the plaintiff County against the defendant Township to recover unpaid balances alleged to be owing and unpaid in respect of the sums directed by the County to be levied in the Township as its portion of the County rate in the years 1934, 1935, 1936, 1937 and 1938.

The action was tried by MAKINS J., without a jury, at Welland.

*G. W. Mason, K.C., and L. C. Raymond, K.C., for the plaintiff.
J. R. Cartwright, K.C., and J. G. Edison, for the defendant.*

March 20th, 1940. MAKINS J.:—On the 5th May, 1933, the Ontario Municipal Board made an order transferring from the Township of Stamford to the City of Niagara Falls an area adjacent to the City of Niagara Falls as described in the said order, and which area included properties which were the subject of heavy assessments. The order was to take effect on the 31st day of December, 1933. The properties therefore contained in the said area from that date onward were in the City of Niagara Falls and were no longer in the Township of Stamford or the County of Welland.

Assessments were made by the said Township, including the area subsequently transferred, for 1932 and 1933.

The County's method of levying its rates may be stated as follows. It is furnished by the Clerk of the Township with the assessment in 1932; they equalize the assessment with other municipalities in 1933, and in 1934 notify the Township Council to levy and collect the County's proportion as affecting Stamford Township. The County's levy therefore for 1934 is based upon the Township's assessment for 1932, and, similarly, the 1935 levy is based upon the Township's assessment for 1933. Both these assessments by the Township are legal and proper assessments, the area referred to being then part of the Township of Stamford.

Section 306 of The Municipal Act, R.S.O. 1927, ch. 233, was amended in 1930 by ch. 44, sec. 12, of that year, and thereafter read: "Levy on the whole rateable property according to the last revised assessment roll", and now is to be found in The Municipal Act, R.S.O. 1937, ch. 266, sec. 315.

Section 306 of the Act, previous to the amendment read: "Levy on the whole rateable property within the municipality"; so that the cases of *Re Sifton and Toronto*, [1929] S.C.R. 484, and *Re Kemp and Toronto* (1930), 65 O.L.R. 423, were decided before that amendment.

By sec. 93 of The Assessment Act, R.S.O. 1937, ch. 272, it is provided that the council of a county in apportioning a county rate among the different townships, towns and villages within the county shall, in order that the same may be assessed equally on the whole rateable property of the county, make the assessment of property equalized in the preceding year the basis upon which the apportionment is made. Therefore the County's levy for 1934 and 1935 is a valid levy based as it is on the Township's assessment for the years 1932 and 1933.

The Township went on to assess the area in question as if it remained in the said Township, and it is argued that this was done pursuant to an arrangement with the County, as the County had joined the Township in appealing from The Municipal Board's order, and if the appeal was successful, and the area remained in the Township, the assessments would all have been made and the taxes would not have been lost pending the final disposition of the appeal.

The Equalization Committee did recommend in its report of the 12th June, 1933, that "whatever loss which might be suffered by the Township in the removal of The American Cyanamide Company to the City of Niagara Falls that the County give full credit to the Township for any loss in assessment which the Township might sustain by reason of said annexation."

Mr. Cartwright argued that the County Council as a whole adopted that resolution, and therefore the Township proceeded to make the assessment believing it was protected by the same. It cannot be found in reading the second part of Exhibit 12 that that is so. It may be that elsewhere the County Council did adopt that resolution, but even if so, it would be ineffective and nothing less than a by-law of the County could have achieved such purpose.

The last revised assessment roll upon which the County could act for its levys of 1934 and 1935 would be the rolls of 1932 and 1933.

The *Sifton* case and the *Kemp* case are still good law in so far as they indicate, in fact hold, that the assessment by the Township cannot legally be made on property which at the time of the assessment is not within the Township, so that the Township's assessments for 1934 and onward are illegal and invalid, and the County cannot impose a levy for its purposes based on invalid assessments. The case of *Re Lyman Brothers Ltd.*, [1933] O.R. 159, was decided by the Court of Appeal and holds in effect that the estate of Lyman Brothers in the hands of the liquidator was subject to business tax for 1931, although it had ceased business at the end of 1930, because of the amendment, as it now is in sec. 315 of The Municipal Act, that the levy should be on the whole rateable property according to the last revised assessment roll, and therefore, while the County may collect its levy for the years 1934 and 1935, it cannot succeed in collecting anything beyond

that as the whole assessment by the Township or County is invalid.

There are claims for accounting made in the pleadings, and it was said that there are discrepancies in the payments which the Township has made since 1932 which must be adjusted.

The plaintiff will have a reference to the Master at Welland to take the accounts since 1932, including 1938, of any balances unpaid or owing by the Township on account of the County's levys, whether for interest or otherwise.

The amounts involved in the two years are, according to Exhibit 13, for 1934 \$7,249.41, for 1935 \$7,017.48. If these figures are not correct the matter may be spoken to and adjusted. In the meantime, there will be judgment for the plaintiffs for the above two amounts and for a reference to the Master at Welland to take the accounts if there is any balance owing by the Township to the County on account of the County levy up to and including 1938, unless the parties can agree on same.

The plaintiff must have its costs up to and including the trial. Costs of the reference, if any, and further directions reserved until after the Master's report.

The defendant Township appealed to the Court of Appeal from the judgment of Makins J. and the plaintiff County cross-appealed.

October 7th and 8th, 1940. The appeal and cross-appeal were heard by ROBERTSON C.J.O., MIDDLETON and MASTEN JJ.A.

J. R. Cartwright, K.C., and *J. G. Edison*, for the defendant, appellant.

G. W. Mason, K.C., for the plaintiff, respondent.

November 16th, 1940. ROBERTSON C.J.O.:—This is an appeal by the defendant Township from the judgment of Makins J. of 21st March, 1940, after the trial of the action by him at Welland without a jury. There is also a cross-appeal by the plaintiff.

The action is brought by the respondent County to recover from the appellant Township unpaid balances alleged to be owing and unpaid in respect of the sums directed by the County to be levied in the Township as its portion of the County rate in the years 1934, 1935, 1936, 1937 and 1938. The learned trial Judge declared that the County is entitled to recover in respect of the years 1934 and 1935. In respect of the later years he held

against the contentions of the County as to the manner in which the sum to be levied in the Township should have been arrived at, and he directed an account to be taken on the basis of his findings.

The dispute between the parties results from an order of the Municipal Board dated 5th May, 1933, and effective as of the 31st December of that year, made under sec. 20 of The Municipal Act, then R.S.O. 1927, ch. 233, whereby certain lands in the Township, used for industrial purposes and having a high assessed value, were annexed to the City of Niagara Falls. Thereby they ceased, on 31st December, 1933, to be within the Township and within the County. The order of the Municipal Board made no provision as to assessments or county rates or other taxes, except that all taxes imposed by the Township for the year 1933 upon the lands so removed, and any and all arrears of taxes on said lands, were declared to belong to the Township and to be collectible, and the liability of these lands for certain school debenture indebtedness was preserved. In fixing appellant's share of the county rate in succeeding years, beginning with 1934, the county council gave no effect to the annexation of part of the lands of the appellant Township to the City of Niagara Falls. These lands were, of course, properly assessed in the Township rolls for the years 1932 and 1933. In later years the assessment in the Township rolls was continued, but that assessment was doubtless invalid. Appellant claims that the order of the Municipal Board annexing the lands to the City of Niagara Falls, coming into effect on 31st December, 1933, the County, beginning with the year 1934, should have omitted the amount of the assessment of these lands from the total assessment of the Township in levying the county rate. It becomes necessary, therefore, to consider the procedure for levying county rates and the rights, duties and obligations of the County and of the Township respectively in the circumstances that have arisen. I do not think the task can be lightened by calling the Township the collector of taxes for the County or its agent, or by applying to either of them any other term that denotes a defined legal relationship. The provisions of The Assessment Act themselves, and they alone define their position. It will be convenient to refer to the Act as it appears in the Revised Statutes of Ontario, 1937, ch. 272, there having been no changes in the period to be covered.

The levying of county rates is provided for in secs. 89-98 of The Assessment Act. Sections 89 and 90 provide for the equalization of the assessment rolls of the several local municipalities in the County, the Council of the County being required by sec. 90 yearly, and not later than the 1st day of July, to examine the assessment rolls of the different townships, towns and villages in the County for the preceding financial year, for the purpose of ascertaining whether the valuations made by the local assessors bear a just relation one to another, and the County Council may, by by-law, for the purpose of county rates, increase or decrease in any township, town or village the aggregate valuations, adding or deducting so much per centum as may, in their opinion, be necessary to produce a just relation between the rolls so examined. The Council is not, however, to reduce the aggregate valuation for the whole County as made by the assessors. The County Clerk is required to transmit a copy of the by-law (called an "equalization by-law") to the Reeve and Clerk of each municipality within ten days after it is passed. A right of appeal is given by sec. 91 to any local municipality dissatisfied with the action of the County Council in increasing or decreasing or refusing to increase or decrease the valuation of any municipality. Section 93 provides that the county council in apportioning a county rate among the different townships, towns and villages within the county shall, in order that the same may be assessed equally on the whole rateable property of the county, make the assessment of property equalized in the preceding year the basis upon which the apportionment is made.

The provisions of The Assessment Act are clear, therefore, that the equalization by-law, provided for by sec. 90, is based upon the assessment rolls of the local municipalities for the preceding year, and that the by-law apportioning the county rate is, by sec. 93, to be based upon the equalization made in the year preceding the apportionment. It will be seen, therefore, that in passing its by-law for county rates in the year 1934 the county council is to proceed upon the basis of the equalization it had made in 1933, and that equalization made in 1933 is made upon an examination of the assessment rolls of the local municipalities for the year 1932.

Having these statutory directions as to the manner of arriving at the apportionment of the county rate among the several townships, towns and villages that make up the County, the

county council, when a sum is to be levied for county purposes, is required by sec. 95 to ascertain, and by by-law direct, what portion of such sum shall be levied in each township, town or village in the County. Section 96 directs that the county clerk forthwith after the county rates have been apportioned do certify to the clerk of each municipality in the county the total amount which has been directed to be levied in that municipality for the then current year for county purposes, and the clerk of the local municipality is to calculate and insert the same in the collector's roll for that year.

The provisions of sec. 98, which were first enacted in 1931, are important. By subsec. (1) it is provided that income assessments of a local municipality shall not be included in, but shall be excluded from, any valuation and equalization by a county council of rateable property in the county for any county purposes, and the ascertainment, imposition or levy by a county council of any rate for county purposes shall be made and rated upon and from the equalized assessment of real property and business assessments only in the county. This, it will be seen, is a modification of the directions of secs. 90 and 93 as to equalization of the local assessment rolls and the apportionment of the county rate, income assessments theretofore being included: *Re Village of Rockcliffe Park and County of Carleton*, [1931] O.R. 737.

Although by subsec. (1) of sec. 98 income assessments are to be excluded by the county council in equalizing the assessments and in apportioning the county rate, there is no such exclusion of income assessments by a local municipality when it collects from its ratepayers that part of the county rate apportioned to it, for subsec. (2) of sec. 98 provides that when any rate is to be levied for county purposes the same shall, in the local municipality, be calculated and levied upon and against the whole rateable property, including assessments of income within such local municipality. This subsection makes the further important direction that this levy in the local municipality is to be according to the last revised assessment roll thereof.

Upon consideration of these several statutory provisions it is evident that, while the declared purpose of the equalization by-law is to produce a just relation between the valuations made by the assessors in the local municipalities in the county, when in the end the county rate is levied upon the individual rate-

payers throughout the county, something less than equality is attained. To some degree, equality has been sacrificed to obtain a system that is workable, as, for example, in the requirement that the apportionment of the county rate shall be on the basis of an assessment equalized in the preceding year and made two years earlier. Then, for reasons not so obvious, income assessments are to be excluded in making the equalization and apportionment, although liable in the end for payment of the rate. There are bound to be changes within two years in the relation to one another of the total assessments in the several local municipalities. Some properties will have been improved and their assessment increased, other individual properties will have deteriorated or become vacant or been damaged by fire or tempest or otherwise affected, and their assessment reduced. In towns and villages business assessments will fluctuate with changes in the occupation and use of business premises. Income assessments, which bear their share of the burden of the county rate when it is collected, are more common in towns and villages than in the townships, and may serve to reduce the rate on the dollar levied in some municipalities below that levied in others in the same county. These and other factors operate to prevent a system designed to bring about a fair distribution of the burden of the county rate from accomplishing absolute equality.

It has been held consistently for many years, by the Courts of this Province, that the statutory provisions for levying the county rate are peremptory and provide the only legal method of procedure. While from time to time there have been changes in and additions to the provisions of the statutes in this regard, much of the original outline of the system remains, and the principle of the older cases is still to be applied. In *Gibson and United Counties of Huron and Bruce* (1860), 20 U.C.R. 111, Robinson C.J., at p. 118, said:

“There is no question that they (the county council) were bound to conform to the directions of the statutes in the method of proceeding; that is, they are not to violate them.”

In *Corporation of Lincoln v. Corporation of Niagara* (1866), 25 U.C.R. 578, it was held that a debt for the county rate could be created by the county only by complying with the statute, even where the defendant's assessment was less than it would have been had the statute been followed.

In *Re Revell and the County of Oxford* (1877), 42 U.C.R. 337, it was held that where the apportionment of the county rate among the local municipalities was made upon the basis of the assessment rolls for 1877 instead of the rolls equalized for 1876, the by-law was bad, and it was quashed. In *Re Township of Nottawasaga and County of Simcoe* (1902), 4 O.L.R. 1, it was held that the provision of the Assessment Act which deals with appeals from the equalization by-law and provides that judgment on the appeal "shall not be deferred beyond the 1st day of August next after such appeal" is imperative.

These decisions are based upon a principle of general application to statutes that authorize the levy of a tax and that has been thus stated by Lord Cairns in *Partington v. Atty.-Gen.* (1869), L.R. 4 H.L. 100, at p. 122:

"I am not at all sure that, in a case of this kind—a fiscal case—form is not amply sufficient; because, as I understand the principle of all fiscal legislation, it is this: if the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible, in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute."

This statement of the principle has been frequently cited with approval in cases of high authority: see *Atty.-Gen. v. Earl of Selborne*, [1902] 1 K.B. 388; *Dyson v. Atty.-Gen.*, [1912] 1 Ch. 158; *Rex v. Crabbs*, [1934] S.C.R. at p. 525; *Worthington v. Atty.-Gen. of Man.*, [1936] S.C.R. at p. 55.

Other cases upon these sections of the Assessment Act are *County of Wentworth v. Township of Saltfleet* (1910), 2 O.W.N. 339; *Re Township of Stamford and County of Welland* (1916), 37 O.L.R. 155; *Township of East Whitby v. City of Oshawa* (1927), 33 O.W.N. 116; *Re Village of Rockcliffe Park and County of Carleton*, [1931] O.R. 737. These cases all recognize the imperative nature of the statutory provisions as to the procedure to be followed. Certain observations in the *Saltfleet* case are not now applicable since the enactment of sec. 98 in 1931, dis-

cussed in the *County of Carleton* case in that year. Whatever may have been the position before that amendment, the County Council cannot now fix a rate on the dollar to be levied by all the local municipalities for county purposes.

In my opinion respondent proceeded as the Assessment Act directs in the years 1934 and 1935 in making the assessments of property made respectively in the years 1932 and 1933, and equalized in 1933 and 1934, the basis upon which to apportion the county rate, and it could not have levied the rate lawfully by any other procedure.

Appellant contends that this is a case for which special provision is made by sec. 94, to which I have not yet referred. Section 94 has been in its present form since 1904. In its form before amendment in 1904 the section was of somewhat long standing and was as follows:

"Where a new municipality is erected within a county so that there are no assessment or valuator's rolls of the new municipality for the next preceding year, the county council shall, by examining the rolls of the former municipality or municipalities of which the new municipality then formed part, ascertain, to the best of their judgment, what part of the assessment of the municipality or municipalities had relation to the new municipality, and what part should continue to be accounted as the assessment of the original municipality, and their several shares of the county tax shall be apportioned between them accordingly."

The amendment of 1904 consisted in prefixing to the old section the words: "Where boundaries of existing municipalities are changed, or".

Appellant contends that this is a case where the boundaries, or at least one boundary of an existing municipality, are or is changed, and that may be so. The difficulty I have is to fit the remedy provided by the section to this case. It may be that by a liberal interpretation of its terms, this section can be made to apply to some cases where boundaries of existing municipalities are changed without erecting a new municipality, but I am unable to discover any way by which the remedy prescribed by the section can be applied in this case. What is directed to be done cannot be done here, for that part of appellant's assessment affected by the alteration of boundaries cannot be related to any other municipality, new or old, within the county, and therefore there cannot be an apportionment of the county tax as the sec-

tion directs. Simply to subtract part of appellant's total assessment and reduce its share of the county tax is not only not authorized by sec. 94, but would seem to be contrary to the direction in sec. 90, subsec. (1) that in the process of equalization the county council "shall not reduce the aggregate valuation for the whole county as made by the assessors." (See *Re Township of Nottawasaga and County of Simcoe*, 4 O.L.R. 1, per Osler J.A., at p. 13). Such a process would further leave some part of the sum required for county purposes unprovided for.

Such a case as the present was not, however, left by the Legislature without provision for adjustment, if the Township were alert to protect itself. Under sec. 20 of the Municipal Act, the Board, in making the order for annexation, may impose such terms and conditions as to taxation and assessment as it may determine.

It is not, I think, open to appellant to argue, as it has argued, that the assessment rolls of the Township of Stamford for the years 1932 and 1933 used for the purpose of the equalization by-laws of the county passed in 1933 and 1934, and therefore forming the basis of the apportionment of the county rate made in 1934 and 1935, were no longer the assessment rolls of that township when the order of the Municipal Board came into effect on 31st December, 1933. The municipal corporation continued its existence, with all its assets and liabilities, rights and powers, unaffected except as the order of the Municipal Board might provide. The direction in the order itself reserving to the Township the taxes for 1933 and any and all arrears of taxes on the lands annexed to the City of Niagara Falls is based upon the continuance of appellant as the same municipality as before, with the same assessment rolls and collectors' rolls. I can find no basis anywhere for the contention that the assessment rolls of the Township for the years 1932 and 1933 ceased to be the Township's assessment rolls for these years as a consequence of the order of the Municipal Board. Consequently, I am unable to see how the County Council could do otherwise than use the Township rolls for these years as the basis of equalization and for the apportionment of the county rate in the years 1934 and 1935. No doubt some inequality results, but, as has been pointed out, a precise equality is not possible under the provisions of the Act. Some inequality is practically unavoidable when the direc-

tions of the Act are followed, but none the less, as Robinson C.J. said in *Gibson and United Counties of Huron and Bruce*, (*supra*), the county council is not to violate them.

Appellant objects that in effect what the county seeks to do is to levy taxes upon lands now outside the county, and reference is made to *Sifton v. City of Toronto*, [1929] S.C.R. 484; *Re Kemp and City of Toronto* (1930), 65 O.L.R. 423, and *In re Lyman Bros. Ltd.*, [1933] O.R. 159. This is, however, to ignore the express provision of sec. 98, subsec. (2) that the appellant is to levy the county rate upon and against the whole rateable property *within the township* according to the then last revised assessment roll thereof. No property outside the township is rateable for appellant's proportion of the county rate.

An argument of another kind was addressed to us based upon the conduct of the County Council in joining with the Township in certain appeals from the order of the Municipal Board, and in other efforts to have the action of the Board reversed or modified. In that connection special reference was made to a resolution of a committee of the County Council of June, 1933, in the following terms:

"Your Committee feel that whatever loss, if any, which may be suffered by the Township of Stamford in the removal of the American Cyanamide Company to the City of Niagara Falls, that the County give full credit to the said Township, for any loss, in assessment which the Township may thereby sustain by reason of said annexation."

The Committee's report containing this resolution appears to have been adopted by the County Council. It is argued that this raises an estoppel of some kind in favour of appellant.

I am quite unable to see how matters of this kind can by estoppel or otherwise affect the collection of taxes, or alter the course the County Council is directed to take to raise the money required for county purposes. The rights and the duties of both the County and the Township in respect to the collection of county rates are prescribed by statute. They are not subject to alteration by resolutions of the Council of either municipality. The rights of other municipalities are concerned and of ratepayers as well. The equalization of assessments and the apportionment of rates by the County Council are matters that concern all the local municipalities in the county, and whatever money is required for county purposes, is, all of it, to be levied as the

Assessment Act provides. Any reduction in the amount of the rate that should, in accordance with the statute, be apportioned to appellant will, of necessity, be added to the rates levied upon the other local municipalities, either in the same year or in another. Quite apart from these considerations, I fail to see in what was done sufficient to raise any estoppel against the County, or otherwise to affect its legal right and duty to collect from appellant whatever amount was apportioned as its share of the county rate, in pursuance of the provisions of the Assessment Act.

I am of opinion, therefore, that in so far as the county rates for the years 1934 and 1935 are concerned the respondent proceeded as the Assessment Act requires, and the sums apportioned by the by-law of the County Council for appellant's share of the county rate in each of these years were lawfully apportioned to it.

For the years subsequent to 1935, in respect of which there is a cross-appeal, the position is quite different. While it is true that after 31st December, 1933, when the order of the Municipal Board became effective, the Township assessor continued to include the lands that had ceased to form part of the Township in the assessment roll, there was no legal justification for it, and I think it can be given no effect. No one was misled by it, not even the County. The County Council, in making the equalization based upon assessment rolls for the several years after 1933, knew that appellant's assessment rolls included the lands that were no longer within the Township. No matter what may have been the expectation of the respective Councils as to what would be the final outcome of their efforts to reverse the action of the Municipal Board, the order of the Municipal Board was in effect and everyone was bound to observe it.

The equalization in each year, beginning with the equalization in 1934, therefore was not made in accordance with the directions of the Assessment Act. It is not necessary here to determine how far the consequences of this failure to conform to the plain directions of the Assessment Act in the equalization process affect what was done thereafter towards levying the county rates, for appellant has paid substantially what it would have been liable to pay if all the proceedings for the levy of the county rate in each year since 1935, including the equalization, had been proper.

Objection was taken by appellant that the right of action is not in the county municipality, but is in its treasurer, and reference was made to sec. 226 of the Assessment Act. Other sections of the Act dealing with payment of the rate, which were referred to and discussed in this connection are sections 203, 223 and 225. It is not necessary, I think, to determine this question here for the county treasurer has consented to be added as a plaintiff, and upon filing his written consent he may be made a party plaintiff to the action. The objection was not taken in the statement of defence, nor in the notice of appeal.

The form of the declaration contained in para. 3 of the judgment should be altered, and the declaration should be that the plaintiff, in making an equalization of assessments under sec. 90 of the Assessment Act in any year after the year 1934, and in apportioning the sums to be levied for county purposes under sec. 95 of The Assessment Act in any year after the year 1935, was not entitled to include as part of appellant's assessment any amount representing the value of the lands annexed to the City of Niagara Falls as mentioned in the pleadings. The direction for taking an account in para. 4 of the judgment should also be altered, and the account to be taken should be of the amounts owing on the basis of the declarations contained in paras. 2 and 3, after crediting payments made and charging interest as provided by the statute.

Subject to these variations in the formal judgment, the appeal and cross-appeal should both be dismissed, and in each case with costs.

MIDDLETON J.A. agreed with ROBERTSON C.J.O.

MASTEN J.A.:—The only question to be determined before this Court on the present appeal is whether the Corporation of the Township of Stamford is liable to pay to the Corporation of the County of Welland the full amount of the moneys payable under equalization and levying by-laws of the county passed in the years 1934, 1935, 1936 and 1937, which by-laws levied the county rate on Stamford as it existed prior to the 31st December, 1933. The several by-laws appear on their face to have been regularly passed in conformity with the provisions of the Assessment Act and the Municipal Act. The relevant statute dealing with the liability of the appellant township is sec. 225(1) of the Assessment Act, R.S.O. 1937, ch. 272, which is as follows:

"The treasurer of every township, town or village shall, on or before the 20th day of December in each year, pay to the treasurer of the county all moneys which were assessed and by law required to be levied and collected in the municipality for county purposes or for any of the purposes mentioned in section 222, and in case of non-payment of such moneys or any portion thereof on or before the said date, the township, town or village so in default shall pay to the county interest thereon at the rate of six per centum per annum from the said date until payment shall be made."

With it are to be read secs. 203 and 132(2) of the same Act.

The method of procedure adopted by the county council involved the passing of two by-laws, one in each successive year. Taking the years 1933-34 as examples, the plaintiff council on the 12th June, 1933, passed a by-law equalizing the several assessment rolls of 1932 covering the several municipalities of the County.

Following this action the county council on the 14th April, 1934, passed a by-law levying a county tax of \$323,091.53 for 1934 and apportioning it pursuant to sec. 93 of the Assessment Act against the several townships and towns of the county, naming them as follows:

Bertie Twp.

Crowland Twp.

Humberstone Twp.

Pelham Twp.

Stamford Twp.

Thorold Twp.

Wainfleet Twp.

Willoughby Twp.

Bridgeburg.

Chippawa Vill.

Crystal Beach Vill.

Fort Erie Town.

Fonthill Vill.

Humberstone Vill.

Port Colborne Town.

Thorold Town.

Under sec. 315 of The Municipal Act, the County Council, having first estimated the sum necessary to pay all debts falling due within the year, assesses and levies a tax on the whole rate-

able property of the county. The amount of the debts to be paid is ascertained and fixed by the County Council, the levy is made by its by-law prescribing the several sums to be borne and paid respectively by the total property of the ratepayers of each township. The township organization is, under the statute, the agent through whom the taxes are collected, but the tax is levied by the county on the rateable property of the township and paid by the ratepayers of the township, and the tax is not levied on the township corporation but on the property in the township, though under sec. 226(1) of the Assessment Act, quoted above, the township is made a guarantor of the sum apportioned to the taxable property within its boundaries.

The difficulty submitted for solution on this appeal arises from the fact that on December 31st, 1933, a separated area of Stamford Township embracing some 139 acres and forming about one-ninth of its taxable property, was, by an order of the provincial Municipal Board passed on the 5th May, 1933, detached from Stamford, added to the City of Niagara Falls, and so ceased to be part of the County of Welland.

Both the township and the county being desirous of retaining this separated area within the ambit of their taxing powers, proceedings to reverse the order of the Municipal Board were instituted jointly by the township and the county, and the cost of such proceeding was subsequently borne in part by each of them.

Pending the disposition of the proceedings so taken, I would find as a fact, after a careful perusal of all the evidence, that with the view of securing such taxes as might be derivable from this area in case the attack on the order of the Municipal Board succeeded, both parties to this appeal concurred in the following plan.

The township had, in the ordinary course, assessed this separated area in 1932 and again in 1933. The assessment rolls of 1932 were duly forwarded to the county in accordance with the requirements of the Assessment Act, and on June 9th, 1933, the county council passed its equalization by-law laying the foundation for the levying by-law of 1934. In passing this equalization by-law the county council ignored the order of the Municipal Board of May 5th, 1933, transferring the separated area to the City of Niagara Falls, whereby that area, after the 31st December, 1933, was outside the County of Welland. The action of the county council was taken with full notice and

knowledge of the order of the Municipal Board in pursuance of the plan agreed upon between it and the Township of Stamford. Subsequently, on the 14th day of April, 1934, they passed, in pursuance of sec. 93, a levying by-law founded on the equalization by-law, and levying the sum of \$64,465.22 on the property of the ratepayers of the Township of Stamford as though no separation order had been made.

The township followed this up by assessing and levying on the separated area along with the rest of the township property as though it had not passed out of the township on the 31st December, 1933, but the taxes were not and could not be collected, and were so entered in the returns on the collector's roll.

This whole procedure I find as a fact was concurred in by both parties.

In this connection it is important to observe that it appears from the minutes of the meeting of the County Council held on June 12, 1933, that along with the formal equalization report quoted above and attached to it was a supplementary report from the equalization committee in these words:

"Your Committee feel that whatever loss, if any, which may be suffered by the Township of Stamford in the removal of the American Cyanamide Company to the City of Niagara Falls that the County give full credit to said Township, for any loss, in assessment which the Township may thereby sustain by reason of said annexation.

All of which is respectfully submitted."

I am satisfied, and would find as a fact, that this resolution was adopted by the council and also that it was relied on by the township in concurring in the course which was pursued and more particularly in its refraining as it did from taking any proceeding against the equalization and levying by-laws not only in 1933 and 1934, but in the three subsequent years.

I pause here to point out that had an appeal been taken it might well have resulted either in quashing the by-law or in amending it by excluding the separated area when formulating the equalization by-law.

Section 91 of the Assessment Act governs such an appeal and provides that the tribunal hearing the appeal may "hear and determine the appeal either with or without the evidence of witnesses", while sec. 87 also applies to broaden the jurisdiction of the appellate tribunal. It enacts as follows:

"It is hereby declared that the court of revision, the county judge, the Ontario Municipal Board, and every court to which and every judge to whom an appeal lies under the Act have jurisdiction to determine not only the amount of any assessment, but also all questions as to whether any persons or things are or were assessable or are or were legally assessed or exempted from assessment."

See also secs. 92 and 94 of the Assessment Act.

But it is unnecessary and therefore undesirable to consider further what might have resulted if the township had appealed against the equalization by-laws, for relying on the representations and conduct of the county the township refrained from entering any appeal, and the equalization by-laws passed in 1933 and 1934 became final and absolute.

Against the levying by-laws passed in 1934 and 1935 no right of appeal appears to be given by the statute.

On the hearing of this appeal I was impressed with the view that though the township was now estopped from setting aside or varying the equalization and levying by-laws of 1933-4 and 1934-5, yet that by its representations and conduct, as above narrated, the county was also estopped from asserting the claims now put forward in this action. Since then I have had the opportunity of further study of the confusing provisions of the statutes, as well as the privilege of reading the reasons of judgment of my Lord the Chief Justice. I concur in his conclusions and fully adopt his reasons.

I think the provisions of the statute are absolute and in the existing circumstances impose a debt on the township. Nor is such conclusion unfair to the township. Though it may have relied in part on the representations and conduct of the county when it refrained from appealing against the equalization by-laws yet it also hoped to preserve for itself the taxes derivable from the separated area. It took its chances and lost. Moreover, it must be taken to have known the law as it now appears, and that the resolution of June 12th, 1933, though adopted by the county, would be wholly ineffective to protect the township against the inexorable obligation arising from sec. 255(1) of the statute combined with the levying and apportioning by-laws of 1934 and 1935. The whole sums then apportioned against the defendant township thereby became payable. The debt has been paid in part only. The balance with interest remains due.

With respect to the taxes of 1936 and 1937 I agree with what has been said by the Chief Justice and have nothing to add. Judgment should go in the terms proposed by him.

Subject to variations in the formal judgment, appeal and cross-appeal dismissed with costs.

[COURT OF APPEAL.]

Treasurer of Ontario v. Blondé et al.

Succession Duty—Constitutional Law—Situs of property—Companies—Share certificates—Deceased domiciled and resident in Ontario—Shares transferable on books of transfer agents of companies in States of Michigan and New York—No transfer agent in Ontario—Whether shares are property situate in Ontario.

The deceased, who died domiciled and resident in Ontario, was at the date of his death the owner of shares of the capital stock of two companies incorporated under the laws of the State of Michigan. The head offices of the two companies were in the City of Detroit in the State of Michigan and the shares were transferable on the books of transfer agents in the States of Michigan and New York. The deceased was the registered owner of the shares and the share certificates were at the date of his death situate in Ontario.

Held, by the majority of the Court of Appeal, that the shares in question were not property situate in Ontario within the meaning of sec. 6(1) of The Succession Duty Act, 1934, 24 Geo. V, ch. 55. The shares were not situate in Ontario because they could not be effectively dealt with in Ontario in the sense of having them transferred and duly registered in the name of a purchaser: *Brassard v. Smith*, [1925] A.C. 371, applied. It is not necessary to determine whether the situs of the shares was in Michigan or in New York for the purpose of concluding that the situs was not in Ontario. Nor are share certificates, even though they bear a company's seal, specialties.

Per Masten J.A. (dissenting): The situs of the shares was in Ontario for the following reasons:

- (a) The share certificates, as physical assets and as muniments of title, constituted property situate in Ontario. The deceased in his lifetime could have dealt with the certificates as a commercial asset in Ontario and could have disposed of his whole beneficial interest by the endorsement of the certificates and by the delivery in Ontario of the certificates so endorsed to the purchaser.
- (b) The share certificates bore the seals of the companies and were specialties and are deemed to be located where the share certificates were at the death of the deceased, i.e., in Ontario.

AN action to recover the balance of duty alleged to be payable under the provisions of The Succession Duty Act. The action was tried on a special case stated by the parties.

October 7th and 8th, 1940, and February 19th, 1941. The action was tried by ROSE C.J.H.C., without a jury at Toronto.

C. R. Magone, K.C., for the plaintiff.

J. H. Rodd, K.C., and *T. W. Whiteside*, K.C., for the defendants.

February 19th, 1941. ROSE C.J.H.C. (delivered orally at the conclusion of the trial):—The question in the case is whether the shares of certain companies were property situate in Ontario at the death of the testator for the purposes of The Succession Duty Act that was in force at the time.

The statute is The Succession Duty Act of 1934, ch. 55, sec. 6(1). It is set out in Mr. Justice McTague's judgment in *Williams v. The King*, [1940] O.R. 320. On the plain wording of the statute, the duty is imposed only if the shares are situate in Ontario. The testator was domiciled in Ontario and the share certificates were in his possession in Windsor. The companies were companies organized under the laws of Michigan. They had their head offices in Detroit, but the shares were transferable not at the head offices but at the offices of transfer agents, and indeed the share certificates in the first instance were issued not from the company's head office but from the office of a company appointed for the purpose of such issue. In each instance the company whose shares are in question had two of these transfer agents, one in Michigan and the other in New York. The transfer agents had equal authority. The shares that are in question could have been transferred either in Detroit or in New York. Neither company had any transfer office in Ontario.

At the time of the trial and of the argument the case of *Williams v. The King* had been decided by Mr. Justice McTague and was standing for argument in the Court of Appeal. After the judgment of the Court of Appeal had been given (it is now reported in [1940] O.R. 403) and I had read the judgment of Mr. Justice Masten, I intimated to counsel for the Provincial Treasurer that if he so desired I should be prepared to hear argument on the question whether the second of the grounds taken by Mr. Justice Masten—namely, that the share certificates, being under seal, as they are in this case, were specialties, and that the location of the specialty obligation is where the specialty is found at the time of the obligee's death—was applicable to the present case and ought to be adopted as a basis of the decision. Counsel desiring that further argument, arrangements were made for the hearing of it, and to-day I have had the benefit of arguments by Mr. Magone and Mr. Rodd.

Mr. Magone contends that what Mr. Justice Masten said applies to this case and ought to be adopted. Mr. Rodd contends that what Mr. Justice Masten said is not binding upon me,

in that, although the remarks are not *obiter*, expressing as they do one of the reasons of one of the learned Justices of Appeal for coming to the conclusion to which the Court came, they are not a necessary part of the reasons of the Court and are not adopted by any other member of the Court, unless it be Mr. Justice Fisher in the short statement on p. 420 that he agrees with the reasons and conclusions of his brother Masten.

In the view that I take of the case, it was not necessary for me to hear Mr. Magone in reply, and perhaps it was unnecessary that I should hear this further argument, because, having had the opportunity of reading the cases that were cited to me on the occasion of the first argument, I have come to the conclusion, apart altogether from this point that has been discussed to-day, that the judgment ought to be in favour of the Provincial Treasurer; but I think it was better that the point should be discussed so that, in case I am wrong in the reasoning by which I have reached my conclusion, there shall be no doubt that it is open in appeal. The position has definitely been taken on behalf of the Treasurer that effect ought to be given to Mr. Justice Masten's reasoning, and, just as definitely, the validity of that reasoning has been called in question by the defendants, and the point is open, but I did not call upon Mr. Magone to reply, because I think it is not incumbent upon me to discuss the question debated to-day, and indeed that it is not desirable that I should express an opinion in respect of it. Even if I had formed the opinion that Mr. Justice Masten's reasoning was unsatisfactory I should have had great hesitation in deciding that I was free to give effect, and ought to give effect, to my own view, and so I propose to say nothing whatever about that point but to confine myself to the question that I have really studied.

Frequently in cases in which the right to collect a tax or duty has arisen the Courts have been called upon to choose between the place in which the owner of shares was domiciled or resident and had his certificates and the place in which an effectual transfer of the shares could be made. The classic case in which that choice has had to be made is *Attorney-General v. Higgins*, 2 Hurlstone and Norman 339, and 157 English Reports 140, in which the choice was the place in which was located the office in which the transfer could be made. That case has been referred to and discussed many times, notably by Mr. Justice Anglin in *Smith v. Provincial Treasurer* (1918), 58 S.C.R. 570, at p. 584, and

in *Brassard v. Smith*, [1925] A.C. 391, and it is not necessary to restate its facts or the precise point that was decided. In *Brassard v. Smith* it was treated as settling the law. All this is set out in Mr. Justice McTague's judgment in *Williams v. The King*. The Courts also have had to choose as between two places in which an effective transfer of the shares could be made, and I think that in all of those that I have seen when the owner or the deceased owner was domiciled and had the certificates in the place where one of the transfer offices was situate, that place has been adopted as the place at which the shares were held to be. In *Rice v. The King*, a recent Quebec case, reported in [1939] 4 D.L.R. 701, the fact that the certificates were in Montreal, where there was a registry, was taken to be sufficient, although the deceased owner had been domiciled in New York, where also there was a registry. In the latest Ontario case, *Williams v. The King*, the shares were transferable in New York, where the testator had been domiciled and where he had had possession of the certificates. The certificates were also transferable in Ontario, where the head office of the company was situate, but their location was taken to be in New York, not Ontario. I do not find in the judgments in that case a statement that the fact that the owner had been domiciled and had had the certificates in New York furnished the reason for the judgment; but something in the *Williams* case, as in many of the other cases, had to turn the scale, and I think that that something was the fact that the deceased owner had been domiciled or resident and had had the certificates at the place of the one registry rather than at the place of the other registry. That fact, I think, has always been found to be sufficient, and sometimes less has sufficed.

I need not multiply examples. *Ivey v. The King*, [1939] 1 D.L.R. 631, is one of them. *Re Macfarlane*, [1933] O.R. 44, I think, is another. (I am not taking them in order). In *re Clark*, [1904] 1 Ch. 294, which is not a taxation case, is a case in which a similar choice had to be made. The testator having been domiciled in England, the certificate being in England, and the only distinction, as it was put, in point of locality being the possession of the certificate, which was essential to complete the title, which title could be transferred either in England or in South Africa, the shares were held to pass under a bequest of personal property in England. In *In re Aschrott*, [1927] 1 Ch. 313, shares of which the certificates were in England, where

there was a registry, but not the sole registry, were held to be locally situate in England, although the owner had been domiciled and had died in Germany. In *Toronto General Trusts Corporation v. The King*, [1938] 1 D.L.R. 40, the real situation of the shares that were in question was held to be in Ontario, where the deceased had been domiciled and had had the certificates and where there was a registry, although there was a registry also at the head office of the company in Montreal.

What has been said does not settle the present case, because the present is like those cases which the present Chief Justice of Canada foresaw as likely to arise. In his judgment in *The King v. National Trust Company*, [1933] S.C.R. 670, in the passage just preceding the passage quoted by Mr. Justice Masten, he says (at p. 674):

“In the evolution of the legal principles derived from the rules governing the earlier practice and their application to new states of fact, novel questions will naturally arise. A corporation debtor may have more than one residence, and, consequently, it may be necessary to determine which of these is the residence of the corporation for the purpose of the enquiry.”

That is not exactly the case that has arisen here; we are not concerned with a corporation debtor, but we are concerned with a novel question, to which the principles, if they can be discovered, of the cases that have been decided ought to be applied. The Courts have decided, as I have said, in cases akin to this, against the place in which the certificates are found and in favour of the place in which the shares can be transferred, and they have decided which of two places in which the shares can be transferred is to be preferred, but they have not decided as between a place in which the certificates are found but where the shares cannot be transferred and one or another of several places in which the shares can be transferred.

Mr. Rodd says—and no doubt he is perfectly right—that the province professed to tax, and in fact had jurisdiction to tax or to impose duty upon, only property that was within the province. He argues, then, that it is not necessary for me to find where outside the province the property in question was located, but that the Treasurer's case is at an end unless I can find positively that the property was located in the province; and he says—and I think, as far as my reading goes, he is right in saying—that the mere domicile of the owner and the presence of the certificate in

a place has not in any of the cases been held to stamp that place as the place in which the shares were located. So he says that, although in this particular instance there would be difficulty in saying whether the location of these shares was in Detroit or New York, I ought to say, "Let Michigan and New York fight out that question if they desire to do so, but I must not hold that the shares are here, because I have no authority for so holding." Mr. Magone says, on the other hand, that you do not find in the cases a decision against the place where the owner was domiciled and the certificates were located and in favour of the place where there can be an effectual transfer if there are two transfer offices equally available, and I think he is right in saying that there is no authority in the books for so doing. So, having to deal with this new point, finding no decided case which entirely covers it, I think that what is to be done is to follow the course approved by the Chief Justice of Canada and to try to decide as nearly as possible in harmony with the course of the earlier decisions.

I cannot find in this particular instance that any one office is the office in which a transfer of the shares can be made effective, so I cannot apply *Attorney-General v. Higgins* and the cases that have followed it; but I have a whole series of cases in which some effect has been given to the fact that the owner of the shares had the certificates with him in the place of his domicile, and I think that, there being nothing else that can be seized upon, I ought to take that fact, which the cases show to be important in some circumstances, as being the governing fact in the circumstances of this case, and for that reason ought to decide in favour of the Provincial Treasurer.

It has been made apparent that I am proceeding upon the assumption that, when the applicability of an enactment of the nature of sec. 6(1) of the Ontario Act of 1934 or the power of a province to impose a tax is under consideration, a local situation is to be attributed to shares. The question whether such an assumption is justified, or is in all cases justified, was by the Privy Council left open in *Brassard v. Smith*; but it is an assumption which lies at the root of many cases that are binding upon a trial Judge, and I have thought that I ought to make it, and ought to consider merely how, following a course suggested by the cases, I can find the place in which these shares were situate at the time of the testator's death. If they were situate some-

where, and if, like the mortgage debts in *Toronto General Trusts Corporation v. The King*, [1919] A.C. 679, which could not be situate in two provinces at once, they are to be deemed to have had only one local situation, and if that situation is not to be discovered by considering the location of the head office of the companies, and if the principle *mobilia sequuntur personam* is no guide—the reason why it is not a guide is given in *Provincial Treasurer of Alberta v. Kerr*, [1933] A.C. 710—then (leaving aside Mr. Justice Masten's second reason for his judgment in *Williams v. The King*) I do not find in the cases any surer guide than the one that I have followed.

There was some discussion when we were here before as to what the form of the judgment was to be. I have looked at my notes of it, and I have read again the extension of the reporter's notes, and I do not know that even now I know how to word the endorsement on the record. What seemed to be said, or what both counsel seemed to favour, was a direction for judgment for \$93,869.93, with a reference to determine whether, pursuant to the statute, interest, and if so how much, is to be added, or whether interest, and if so how much, is to be credited. I do not know whether in the interval they have considered the matter any further and can suggest a better endorsement than that or not. I confess I do not really understand what the referee would be doing if there was a reference pursuant to such a direction.

Can you help me at all, or can you agree on something, that will obviate the necessity of any reference?

MR. WHITESIDE: I think we could agree on an amount and then give that to your Lordship.

MR. MAGONE: We will do that, my Lord. We will agree on an amount and give that amount to your Lordship to incorporate.

HIS LORDSHIP: That is much the simpler course, if you can do that.

MR. MAGONE: We can do that, my Lord.

HIS LORDSHIP: Then what shall I do? Refrain from endorsing the record at all to-night?

MR. MAGONE: Yes, my Lord. We will do it to-morrow.

HIS LORDSHIP: Do you think you can do that?

MR. MAGONE: We will do it right away. My friend says he does not know whether he can do it to-morrow or not, but we will do it at once.

HIS LORDSHIP: Then shall I refrain from endorsing the record?

MR. MAGONE: I think that would be well, my Lord, yes.

HIS LORDSHIP: Very well.

Tell me also, if it is necessary to tell me, this: You make the claim against the executrices, then you make it against the beneficiaries—this is from the endorsement on your writ of summons—and then you say as regards each of the beneficiaries that the sum is payable out of the shares of the capital stock of these two companies, and so on. Now, is there any need for anything of that in the endorsement?

MR. MAGONE: Well, I think probably, my Lord, that each of the beneficiaries is not to be subject to a judgment for the whole amount, but only for her share.

HIS LORDSHIP: If in a direction to the Registrar to enter a judgment I used the words of this claim as endorsed on the writ of summons, I am afraid that the poor Registrar would be in a difficulty as great as the one I am in at the moment. Can you come to that also?

MR. WHITESIDE: I think we could. At the moment there is security posted with the Provincial Treasurer to cover the whole claim, so I think we can work that out.

HIS LORDSHIP: Well, do you not agree with me that a direction in this form to the Registrar would simply have you both back—

MR. WHITESIDE: That is right; we will agree on that too.

HIS LORDSHIP: —contending as to what that meant and what he ought to put in his judgment?

Are costs asked for?

MR. MAGONE: Yes, my Lord.

The defendants appealed to the Court of Appeal from the judgment of Rose C.J.H.C.

April 9th and 10th, 1941. The appeal was heard by ROBERTSON C.J.O., MIDDLETON, MASTEN, HENDERSON and GILLANDERS J.J.A.

J. H. Rodd, K.C., and T. W. Whiteside, K.C., for the defendants, appellants, contended that the shares in question, being shares of foreign companies and having no place of registry in Ontario, were not property situate in Ontario. The learned Chief Justice of the High Court erred in not applying the estab-

lished principle of law that the local situation of shares is, for succession duty purposes, the place where they can be effectively dealt with.

There is no foundation in law for holding that when there are two places of registry, neither of which is within Ontario, the actual *situs* of the shares is where the certificates are found. The shares could not be effectively dealt with in Ontario and therefore cannot properly be found to be locally situate in Ontario for succession duty purposes: *Attorney-General v. Higgins* (1857), 2 H. & N. 339; *Attorney-General v. Lord Sudeley et al.*, [1896] 1 Q.B. 354; *Attorney-General v. New York Breweries Co.*, [1898] 1 Q.B. 205; *Commissioners of Stamps v. Hope*, [1891] A.C. 476; *Toronto General Trusts Corporation v. The King*, [1919] A.C. 679; *Re McFarlane*, [1933] O.R. 44; *Brassard v. Smith*, [1925] A.C. 371; *The King v. New York Trust Co.*, [1933] S.C.R. 670; *Erie Beach Co. Ltd. v. Attorney-General for Ontario*, [1930] A.C. 161; *Provincial Treasurer of Alberta v. Kerr*, [1933] A.C. 710; *Cotton v. The King* (1912), 45 S.C.R. 469; *Williams v. The King*, [1940] O.R. 403.

C. R. Magone, K.C., for the plaintiff, respondent, contended that where shares can be effectively dealt with in more than one jurisdiction the place where the certificate is found is then the determining factor: *Stern v. The Queen*, [1896] 1 Q.B. 211; *Attorney-General v. Bouwens* (1838), 4 M. & W. 171; *In re Clark*, [1904] 1 Ch. 294; *In re Ashcroft*, [1927] 1 Ch. 313.

Shares cannot have a *situs* in a State or Province where there is (i) a transfer office only, (ii) a head office only, (iii) a transfer office and a head office, unless the share certificates are also found in such State or Province. Hence the shares in question in this case cannot have a *situs* either in Michigan or New York: *Re McFarlane*, [1933] O.R. 44; *Rice v. The King*, [1939] 4 D.L.R. 701 (Que.); *Ivey v. The King*, [1939] 1 D.L.R. 631 (Que.).

Where the ordinary rules for determining *situs* cannot be applied the Court should consider all the circumstances: *Toronto General Trusts Corporation v. The King*, [1919] A.C. 679.

The legal representatives of the deceased, authorized to act by the grant of probate in Ontario, were entitled to take possession of the certificates in Ontario and to deal with them: *Attorney-General for Ontario v. Newman* (1900), 1 O.L.R. 511; *Blackwood v. The Queen* (1882), 8 App. Cas. 82, at p. 91.

In the alternative, the shares were specialties since they bore the seals of the respective companies. Therefore, the shares have a *situs* where the certificates were found, *i.e.*, in Ontario: per Masten J.A. in *Williams v. The King*, [1940] O.R. 403.

Cur. adv. vult.

June 24th, 1941. ROBERTSON C.J.O.:—An appeal from the judgment of the Chief Justice of the High Court, dated 19th February, 1941. The matter came before him by way of a special case stated by the parties.

Albert Theodore Montreuil, late of the City of Windsor, in the Province of Ontario, died on the 2nd October, 1936, domiciled in Ontario. He left a will, of which probate was granted by the Surrogate Court of the County of Essex to the respondents, the defendants in the action, on the 29th October, 1936. The deceased left an estate, the aggregate value of which, as fixed for succession duty purposes, is over \$1,000,000.00.

At the time of his death the deceased was the owner of 8,000 fully paid, non par value shares of the capital stock of Briggs Manufacturing Company, the value of which for the purposes of the case is agreed to be \$480,000.00. These shares were registered in the name of the deceased, and the share certificates were at the time of his death in his possession in a safety deposit box at Windsor.

The Briggs Manufacturing Company is incorporated under the laws of the State of Michigan, and its head office is at the City of Detroit in that State. The Company was incorporated on the 9th November, 1909. On the 27th December, 1924, the Company appointed a trust company, now known as Detroit Trust Company, of the City of Detroit, and the New York Trust Company, of the City of New York, as its agents, with the title transfer agent, for the transfer of shares of its capital stock. The appointment of the Detroit Trust Company was effective as of December 27th, 1924, and the appointment of the New York Trust Company was effective as of January 2nd, 1925. The Detroit Trust Company maintains a register of transfers of shares of the Briggs Manufacturing Company at its office in the City of Detroit, and the New York Trust Company maintains a similar register at its office in the City of New York. Somewhat detailed instructions were issued to the transfer agents

on their appointment, but it is not necessary to set them out. There was no distinction made between the two transfer offices as to the shares that might be transferred there. Any and all of the issued shares could be transferred at the office of either transfer agent. The form of share certificate states that the shares are transferable in person, or by duly authorized attorney, upon surrender of the certificate properly endorsed. The Briggs Manufacturing Company itself did not, at the date of the death of the deceased, maintain and it has not since, maintained a register of transfers of shares, nor itself make and record such transfers, and it had no other agent for the transfer of shares than the two trust companies mentioned.

At the date of his death the deceased was also the owner of 41,000 fully paid, non par value shares of the common stock of Pfeiffer Brewing Company, the value of which is agreed to be \$425,375.00. These shares were also registered in the name of the deceased, and the share certificates were in his possession in a safety deposit box in Windsor.

The Pfeiffer Brewing Company was incorporated under the laws of Michigan on 5th February, 1926, and its head office is at the City of Detroit. On the 5th June, 1933, Pfeiffer Brewing Company appointed Detroit Trust Company and City National Bank and Trust Company, of the City of Chicago, agents for the transfer of shares. On 21st March, 1934, the Company discontinued the services of City National Bank and Trust Company as transfer agent, and retained Detroit Trust Company as its sole transfer agent. Then, on 19th July, 1935, the Company appointed Guaranty Trust Company of New York as transfer agent in the City of New York. Each of these trust companies maintains a register of transfers of shares of Pfeiffer Brewing Company, the one at its office in Detroit, and the other at its office in the City of New York. All transfers of shares are made by these transfer agents and recorded by them, no distinction being made between them as to which of the common shares they may transfer and record. The certificate for shares of Pfeiffer Brewing Company states that the shares are transferable only on the books of the Corporation by the holder thereof in person or by attorney, upon surrender of the certificate properly endorsed. Pfeiffer Brewing Company itself did not, at the date of the death of the deceased, and it has not since, maintained a register of transfer of shares, nor itself make and record such transfers,

and it had not at the date of the death of the deceased, and has not since had, any transfer agent other than the two trust companies named.

The certificates for the shares of Briggs Manufacturing Company held by the deceased were issued and recorded by Detroit Trust Company as transfer agent, notice thereof being given to the New York Trust Company. The certificates for the shares of the Pfeiffer Brewing Company owned by the deceased were also issued and recorded by Detroit Trust Company as transfer agent, and notice thereof was duly given to Guaranty Trust Company.

A copy of the probate is annexed to the special case and forms part of it. The special case also sets out some facts with respect to the persons who take interests under the will. There are seven persons among whom, after certain life interests, the estate is to be divided. Two of these persons are resident and domiciled in Ontario, and the remaining five are, and were at the death of the testator, resident and domiciled in the State of Michigan. The executrices and trustees of the estate have paid to the Province of Ontario a sum in full of the succession duty upon all the property of the deceased admitted to be situate in the Province of Ontario on the date of his death. The sum paid also includes succession duty in respect of the interests taken under the will by two residuary legatees, who are resident and domiciled in Ontario, in the shares of Briggs Manufacturing Company and the Pfeiffer Brewing Company that are in question. This duty was no doubt paid as on a "transmission within Ontario" under sec. 6 of The Succession Duty Act of 1934, 24 Geo. V, ch. 55.

The plaintiff in the action claims, and the defendants deny, that these shares were, at the death of the deceased, property situate in the Province of Ontario, and that succession duty was also payable to the Province of Ontario thereon so far as the interests of five legatees resident in the State of Michigan were concerned. The claim of the plaintiff for duty is presumably based on subsec. (1) of sec. 6 of The Succession Duty Act, which provides for duty on "all property situate in Ontario passing on the death" of any person, whether the deceased was at the time of his death domiciled in Ontario or elsewhere.

The question stated for the opinion of the Court is:

“Were the said shares of capital stock of Briggs Manufacturing Company, and Pfeiffer Brewing Company, property locally situate in the Province of Ontario at the death of the said Albert Theodore Montreuil, for the purposes of The Succession Duty Act, and as so locally situate, subject to succession duty?”

If the opinion of the Court is in the affirmative, then judgment is to be entered in favour of the plaintiff for an agreed sum, with costs, subject to some adjustment. If the opinion of the Court is in the negative, then judgment is to be entered for the defendants, dismissing the action with costs.

The learned Chief Justice of the High Court was of the opinion that, assuming that a local situation is to be attributed to shares, then the shares in question in this case must be held to have been locally situate in the Province of Ontario at the death of the deceased, as contended by the respondent, and he gave judgment accordingly.

The learned Chief Justice arrived at this conclusion after a review of many cases that deal with questions as to the method of determining the place where personal property of one kind and another is situated for the purpose of succession duty, some of them being cases where the property consisted of shares in a corporation. While recognizing that the place where the shares can be transferred is in ordinary circumstances the *situs* of the shares, that being the place where they can be effectively dealt with, as determined in such cases at *Attorney-General v. Higgins* (1857), 2 H. & N. 339, and *Brassard v. Smith*, [1925] A.C. 371, the Chief Justice was of opinion that special circumstances prevented the application of these decisions here. The fact that, in the case of each of the companies whose shares are in question, there are two places where its shares can be transferred, and that there is nothing stated in the special case from which it can be determined that one of these places rather than the other is the *situs* of the shares, made it impossible, in the opinion of the Chief Justice, to find that the shares are situated within the jurisdiction in which either transfer office is established. It, therefore, became necessary, in his opinion, to disregard both places and to find a different place. He held that the *situs* of the shares in the circumstances of this case was determined by the testator's domicile, that being also the place where the testator had in his possession at the date of his death the certificates for the shares.

With great respect I think the learned Chief Justice has erred in two respects. In the first place, the learned Chief Justice has failed to appreciate the essential character of the requirement that the property can be effectively dealt with there in determining the local situation of intangible property. In the case of shares in a company, that has been held to mean that the shares can be transferred within the jurisdiction. As was said in *Brasard v. Smith, supra*, at p. 376, "That is, in their Lordships' opinion, the true test, where could the shares be effectively dealt with?"

In the second place, the question stated for the opinion of the Court did not require him to determine the *situs* of the shares as between Detroit and New York. "Were the shares property locally situate in the Province of Ontario?" is the question stated. One is not entitled to assume that the parties have agreed upon and have set forth in the special case all the facts relevant to another question not submitted.

The question whether intangible property can have a local situation has been raised frequently, but the respondent cannot raise that question here. Not only is the question stated for the opinion of the Court based upon the assumption that these shares had a local situation, but the statute, where it levies succession duty upon property, levies it only upon property situate in Ontario. The Provincial Legislature is limited by the British North America Act to direct taxation within the Province (sec. 92(2)), and the form which the Succession Duty Act had taken in the revision of 1934 was to a great extent dictated by the need to keep within the two limitations of direct taxation on the one hand, and taxation within the Province on the other. Not being able to tax the executors or trustees because that would not be direct taxation and not being able to impose the tax on the succession because the persons benefited by the succession were resident and domiciled out of Ontario, there was only the property itself upon which the duty could be imposed, and that only if the property was within the Province. Respondent has assumed the burden of establishing that it was so locally situated at the death of the testator.

It was not by the application of the rule *mobilia sequuntur personam* that the learned Chief Justice fixed the *situs* of the shares at the place of the testator's domicile. Notwithstanding that in *Smith v. Provincial Treasurer for Nova Scotia* (1918),

58 S.C.R. 570, that rule was held to govern in determining the local situation of shares for the purpose of succession duty, it must be taken to be definitely settled by later decisions that the rule is not to be so applied. The rule *mobilia sequuntur personam* is not in fact a rule for determining the *situs* of *mobilia*. It is a rule for determining, regardless of the local situation of the property, the law that governs it for the purposes of disposition in the owner's lifetime and succession on his death. As was said by Lord Selborne in *Freke v. Lord Carbery* (1873), L.R. 16 Eq. 461, at p. 466: "When *mobilia* are in places other than that of the person to whom they belong, their accidental *situs* is disregarded and they are held to go with the person." In the same judgment Lord Selborne said that certain words of Lord Loughborough which Story had quoted with approbation in his "Conflict of Laws", were simply a translation into the phraseology of the English law of the maxim *mobilia sequuntur personam*. The words quoted are from the judgment in *Sill v. Worswick* (1791), 1 H.Bl. 665, and are as follows:

"It is a clear proposition, not only of the law of England, but of every country in the world, where law has the semblance of science, that personal property has no locality. The meaning of that is, not that personal property has no visible locality, but that it is subject to that law which governs the person of the owner. With respect to the disposition of it, with respect to the transmission of it, either by succession or the act of the party, it follows the law of the person. The owner in any country may dispose of his personal property. If he dies it is not the law of the country in which the property is, but the law of the country of which he was a subject, that will regulate the succession."

Obviously a rule so defined can have no place in determining the "locality" that it ignores.

That a "local situation" ascribed to intangible property is not a wholly fictitious thing, is stated by Duff J. (now Chief Justice of Canada) in his judgment in *Smith v. Levesque*, [1923] S.C.R. 578, at pp. 585-6, where he cites the language of Lord Abinger in *Attorney-General v. Bouwens* (1838), 4 M. & W. 171, at p. 191 of that report, as to the limited jurisdiction of the ordinary. Immediately following that passage the Chief Baron continued with certain examples, as follows:

“As to the locality of many descriptions of effects, household and moveable goods, for instance, there never could be any dispute; but to prevent conflicting jurisdictions between different ordinaries, with respect to choses in action and titles to property, it was established as law, that judgments debts were assets, for the purposes of jurisdiction, where the judgment is recorded; leases, where the land lies; specialty debts, where the instrument happens to be; and simple contract debts, where the debtor resides at the time of the testator’s death: . . . In truth, with respect to simple contract debts, the only act of administration that could be performed by the ordinary would be to recover or to receive payment of the debt, and that would be done by him within whose jurisdiction the debtor happened to be.”

It is not only for the purpose of ascertaining the jurisdiction of the ordinary, and for the kindred purpose of defining the authority of an executor or administrator as in *New York Breweries Co. v. Attorney-General*, [1899] A.C. 62, that it became important to ascribe a local situation to *mobilia*. There is the case where an owner dies intestate leaving no next-of-kin. The rule *mobilia sequuntur personam* does not apply, there being no succession in these circumstances, but his “*mobilia*” being dealt with as *bona vacantia*, the right to it depends upon its local situation: *In re Barnett’s Trusts*, [1902] 1 Ch. 847. There is a discussion of the matter of “local situation” of intangibles, particularly of simple contract debts, in *English, Scottish and Australian Bank Ltd. v. Inland Revenue Commissioners*, [1932] A.C. 238, where many cases are cited and examples are given. For purposes of taxation, where the tax is imposed upon the property itself and not upon the owner of it, a local situation within the jurisdiction of the taxing authority is necessary, for one state does not recognize the revenue laws of another. This is of particular importance in the case of the Canadian provinces, for not only is their power to tax limited to taxation within the province, but a province cannot itself prescribe the conditions fixing the *situs* of intangible property to enlarge its powers of taxation: *The King v. National Trust Co.*, [1933] S.C.R. 670, at p. 673. For these and other purposes it has been found necessary to recognize the existence of a local situation for chattels—notwithstanding that they are movable

—and in the case of intangibles perhaps even to assume its existence in contemplation of law, if not physically. In any event, to attribute a local situation to intangible property is not something that depends upon mere fancy. There are established rules to govern it, and the essential thing that determines the local situation is the circumstance that it is there that the intangible property can be effectively dealt with.

In the case of shares, to deal effectively with them means to do such things as to have them duly registered in the name of the personal representative, or of the persons to whom they are bequeathed, so that they may receive the dividends upon them and vote upon them and dispose of them, as for example, by transfer to a purchaser on a sale in the course of administration. These things can be completely done only at a place where the transfer of the shares may be recorded.

In the nature of things no other place can be preferred as the local situation of shares, that is, as the place where they may be effectively dealt with, to the place where they can be transferred. That there are two places, at either one of which transfer of the shares may be made, does not in the slightest degree serve to qualify another place, where the shares cannot be transferred, as their local situation, no matter what difficulties there may be in distinguishing between the two places first mentioned. By no sort of analogy can such another place be regarded as the place where the shares may be effectively dealt with, in any event while there exists a place where a transfer of the shares may be properly made. It was not by way of analogy the Court proceeded in such cases as *Williams v. The King*, [1940] O.R. 320 and 403. While it is not so stated in any of the judgments in that case, it is reasonably clear that the place of the testator's domicile was preferred as the *situs* of the shares over another place when there were transfer offices at both places, because that was the normal place for obtaining probate, and where probate had in fact been granted. It is only in this supplementary way that the testator's domicile was given weight in determining the *situs* of the shares. Not in any sense whatever was domicile regarded as being in itself within the description of a place where the shares could be effectively dealt with. Even if the *dictum* of Lord Westbury in *Enohin v. Wylie* (1862), 10 H.L. Cases 1, as to there being

a prior right in the jurisdiction of domicile to grant probate, puts the matter too strongly—see *Ewing v. Orr Ewing* (1885), 10 App. Cas. 502—the practical convenience of preferring the place of domicile is obvious, as it is the place where probate will normally be applied for, and where any appropriate tax will be demanded.

No doubt in the present case, if it has not already been done, at some time it will be necessary to record a transfer of the shares now in question from the testator's name into the names of the trustees, or of some one else, at one of the transfer offices, and for that purpose it will be necessary to prove the will in that jurisdiction. It may be illogical to say that the local situation of the shares at the death of the testator will in that way be determined, but it is nevertheless not to be lost sight of that the factors that lead the executors to apply for probate in one of the places where the shares may be transferred, rather than in the other, may likewise serve to determine that, at the death of the testator, that place had the better claim to be named as the *situs* of the shares.

So long as there is a place where the shares can be transferred, whether that place is Michigan or New York need not be determined in order to reach the conclusion that Ontario is not the *situs* of the shares. The special case agreed upon by the parties does not say, and one is not entitled to assume, that there are set forth in the special case all the facts that will merit consideration when the respective claims of Michigan and New York to be the *situs* of the shares come to be investigated. In *New York Life Insurance Co. v. Public Trustee*, [1924] 2 Ch. 101, there was a question as to the local situation of certain simple contract debts owing by a corporate debtor. The company had more than one "place of residence", so that something more had to be done than merely to apply the rule that the residence of the debtor is deemed to be the local situation of a simple contract debt. In the circumstances the Court considered that it was entitled to look at the terms of the contract creating the debts, and finding there that although the head office of the debtor was in New York, the promise in each contract was to pay in London, it was held that the debts were property situate in England, where the company also had an office.

I think I should also refer to the case of *Toronto General Trusts Corporation v. The King*, [1919] A.C. 679, for some expressions in that judgment may at first seem to lend colour to the contentions of the respondent. In that case the testator was mortgagee of real estate in Alberta. He resided at Ottawa and at the time of his death he had in his possession at Ottawa duplicate originals of his mortgages. Other duplicate originals were in the office of the Registrar of Land Titles in Alberta. The mortgagors resided in Alberta and the place of payment named in each mortgage was in Alberta. Succession duty having been claimed in Alberta the administrator contended that the mortgages were situate not in Alberta, but in Ontario, at the death of the testator, citing the rule that the locality of a specialty debt is the place where the specialty itself is found. Viscount Cave said at p. 684: "In these circumstances any argument which goes to show that, under the rule which fixes the locality of a specialty debt in the place where the specialty is found, the debts in this case were situate in Ontario at the testator's death, is equally effective to prove that they were situate in Alberta; and yet it is plainly impossible to hold that they were situate in both Provinces at once . . . The truth appears to be that in such cases the rule gives no guidance on the question of the locality of the debt and regard must be had to the other circumstances of the case."

This language, although it relates not to shares but to specialty debts, which are in another category, may appear to afford some support to the views of the learned Chief Justice in the present case, who thought the location of a transfer office no guide if there were two of them. In reality it does the opposite. Viscount Cave was discussing a case where the dispute was as to which of two places, in each of which original duplicates of the mortgages were alike found, was to be deemed the locality of the debt. He did not think of discarding both of them. When he speaks of the rule giving no guidance in such a case, he means only that it gives no guidance in determining as between these two places. There is no suggestion that in such circumstances neither Alberta nor Ontario was the *situs*, and that some third place must be chosen in which no specialty was found. On the contrary the rule cited was given its full effect, so far as it goes, and served to confine the enquiry

to these two places in each of which duplicate mortgages were found. As a guide to determine further as between the two places which one of them was the locality, the rule did not serve and something additional was needed. Alberta was found to be the true *situs* on grounds that have no relevance here. So in the present case, having two places at either of which the shares may be transferred, one of them must be the *situs*. The fact that the head office of each of the companies whose shares are in question is in Detroit, and that the share certificates held by the testator were issued in Detroit, may be found to warrant a finding that there is the local situation of the shares. There may be some principle of law applicable to the property in the foreign jurisdiction that will have weight in fixing the *situs*. These are matters that are not essential to the determination of this case, even if to establish some one place other than Ontario as the local situation of the shares would have been the most convincing answer to respondent's claim.

Certain other propositions are put forward in support of respondent's contentions, but the learned Chief Justice did not pronounce upon them. It is argued that in fact the shares could have been sold by the executors in Ontario without reference to any transfer office. This submission was based upon the assumption that the share certificates are in such form, or can be put in such form by the executors, acting under the authority of the probate issued to them in Ontario, that the mere delivery of the certificates will effect a complete transfer of the property in the shares. This assumes that the share certificates are endorsed, or that the executors themselves, under their present authority, can sufficiently endorse them in the manner referred to in such cases as *Smith v. Rogers* (1898), 30 O.R. 256, and *McLeod v. Brazilian Traction, Light & Power Co.* (1927), 60 O.L.R. 253.

The initial difficulty in giving effect to this contention is that the share certificates are not endorsed with the signature of the testator, in whose name they are registered, and unless and until the executors obtain authority to act as the testator's representatives in a jurisdiction in which the transfer can be registered, their signatures in that capacity go for nothing: *New York Breweries Co. Ltd. v. Attorney-General*, [1899] A.C. 62; *Fidelity Trust Co. v. Fenwick* (1921), 51 O.L.R. 23, at p. 35.

The fact that the executors might sell the shares in Ontario—if it is a fact—does not assist in fixing their local situation. As was said by Lord Lindley in *Muller & Co.'s Margarine, Lim's Case*, [1901] A.C. 217, at p. 238, referring to the conclusion of Rigby L.J. in *Smelting Co. of Australia v. Commissioners of Inland Revenue*, [1897] 1 Q.B. 175, that as the property there in question was saleable and sold in England, it could not be regarded as locally situate out of it, "any property situate anywhere can be agreed to be sold or purport to be sold in any other country and the test of locality relied upon by the Lord Justice was not, I think, the true one. The patent was not assignable without registration in Australia, and the view of the Lord Justice is, I think, opposed to *Attorney-General v. Diamond*, the case of French rentes." Also see *English, Scottish and Australian Bank Ltd. v. Inland Revenue Commissioners*, (*supra*).

The nature of the testator's property in shares registered in his own name as here, is to be distinguished from that which is taken by one who holds the certificates for shares registered in the name of another who has signed in blank a form of transfer endorsed on the certificates, and has then delivered the certificates so endorsed. The property held by the transferee in the latter case is described in *Colonial Bank v. Cady* (1890), 15 App. Cas. 267 (per Lord Watson at p. 277) as being in the nature of a *jus ad rem* and not a *jus in re*. "Delivery does not invest him with the ownership of the shares in the sense that no further act is required in order to perfect the right." The original transferor who is entered as owner in the certificate and register continues to be the only shareholder recognized by the company and "delivery passes, not the property of the shares, but a title legal and equitable, which will enable the holder to vest himself with the shares without risk of his right being defeated by any other person deriving title from the registered owner." Whether or not the interest in or right to the shares held by such a transferee may differ in its "local situation" from the property in the shares, is a question that does not arise in this case. See *Stern v. The Queen*, [1896] 1 Q.B. 211. The property that this testator owned was shares registered in his own name.

The further point was argued and is referred to in the judgment of the Chief Justice of the High Court, that the certificates for the shares being under the company's seal are specialties,

and that the shares are, therefore, to be deemed to be locally situated where the share certificates were at the death of the testator. In support of this contention is cited the judgment of Masten J.A. in the case of *Williams v. The King*, (*supra*), at pp. 413 *et seq.*

With great deference to so eminent an authority on all matters relating to company law and practice, I was unable to concur in the opinion of Mr. Justice Masten in the *Williams* case on that point, and I am unable to agree now that the share certificates in the possession of this testator at the time of his death fix the local situation of the shares at Windsor. No doubt there are definitions to be found of the word "specialty" that will include any document sealed and delivered, but that is not its common meaning. The certificates in this case are mere statements of the ownership of the shares and of their being transferable in the manner stated, but they are not the primary record even of these matters. "The certificate is not the title but evidence of the title to the shares": *Union Bank v. Morris* (1900), 27 O.A.R. 396, at p. 408; and see *Shropshire Union R.W. & Canal Co. v. Regina* (1875), L.R. 7 H.L. 496, at p. 509, per Lord Cairns, and at p. 512, per Lord Hatherley. The certificates are not in themselves contracts. They do not contain the statement of any debt, obligation or promise, and in themselves they are not evidence of any. In the cases where it has been held that an unpaid dividend or an unpaid call is a specialty debt, it will generally, if not always, be found that this is founded upon statute or the terms of the certificate, or some deed to which the shareholder is a party.

In *Royal Trust Co. v. Attorney-General for Alberta*, [1930] A.C. 144, at pp. 151-2, it was pointed out that the bonds there in question, which were specialties, were not to be likened to the shares of a joint stock company which had been in question in *Brassard v. Smith*, (*supra*).

I am further of the opinion that so far as this Court is concerned we are precluded in any event by a series of cases binding on us from giving effect to either of the two contentions of the respondent that I have last dealt with. Some of the most recent of these cases are *Brassard v. Smith*, (*supra*); *Erie Beach Co. v. Attorney-General for Ontario*, [1930] A.C. 161; *Provincial-Treasurer of Alberta v. Kerr*, [1933] A.C. 710.

I would allow the appeal with costs, and dismiss the action with costs.

MIDDLETON and GILLANDERS JJ.A. agreed with Robertson C.J.O.

HENDERSON J.A.:—An appeal from the judgment of the learned Chief Justice of the High Court, dated February 19th, 1941, upon a special case agreed on by the solicitors for the plaintiff and defendants, the question for the opinion of the Court being: “Were the said shares of capital stock of Briggs Manufacturing Company, and Pfeiffer Brewing Company, property locally situate in the Province of Ontario at the death of the said Albert Theodore Montreuil, for the purposes of the Succession Duty Act, and as so locally situate, subject to Succession Duty?”

I am in entire agreement with the statement of facts and the review of the authorities found in the reasons for judgment of the learned Chief Justice. With the greatest respect I find myself unable to agree with the conclusion he reached.

The point for decision is stated by the learned Chief Justice in his reasons for judgment as follows:

“That is not exactly the case that has arisen here; we are not concerned with a corporation debtor, but we are concerned with a novel question, to which the principles, if they can be discovered, of the cases that have been decided ought to be applied. The courts have decided, as I have said, in cases akin to this, against the place in which the certificates are found and in favour of the place in which the shares can be transferred, and they have decided which of two places in which the shares can be transferred is to be preferred, but they have not decided as between a place in which the certificates are found but where the shares cannot be transferred and one or another of several places in which the shares can be transferred.

“Mr. Rodd says—and no doubt he is perfectly right—that the province professed to tax, and in fact had jurisdiction to tax or to impose duty upon, only property that was within the province. He argues, then, that it is not necessary for me to find where outside the province the property in question was located, but that the Treasurer’s case is at an end unless I can find positively that the property was located in the province; and he says—and I think, as far as my reading goes, he is right in saying—that the mere domicile of the owner and the presence of the certificate in a place has not in any of the cases been

held to stamp that place as the place in which the shares were located. So he says that, although in this particular instance there would be difficulty in saying whether the location of these shares was in Detroit or New York, I ought to say, 'Let Michigan and New York fight out that question if they desire to do so, but I must not hold that the shares are here, because I have no authority for so holding'. Mr. Magone says, on the other hand, that you do not find in the cases a decision against the place where the owner was domiciled and the certificates were located and in favour of the place where there can be an effectual transfer if there are two transfer offices equally available, and I think he is right in saying that there is no authority in the books for so doing. So, having to deal with this new point, finding no decided case which entirely covers it, I think that what is to be done is to follow the course approved by the Chief Justice of Canada and to try to decide as nearly as possible in harmony with the course of the earlier decisions."

Following this, the learned Chief Justice came to the conclusion that, as he could not find that any one office is the office in which a transfer of the shares could be made effective, he should conclude that the place where the domicile of the testator was at the time of his death, together with his possession of the share certificates in that domicile, which was in this case Ontario, should determine the matter. With this I am unable to agree.

The special case does not disclose what was done by the executors, if anything, with reference to the share certificates between the date of the death and the bringing of this action. It may be that having obtained probate in Ontario, they presented the share certificates standing in the name of the testator, together with assignments endorsed thereon, signed by them as executors to themselves, and had these shares transferred into their own names either in Detroit or in New York as they might see fit. They had a choice and could have it done in either place, but the fact remains that they could not effect this without the production of probate or an exemplification of it, exhibiting their title to have the shares transferred because the shares stood in the name of their testator in the companies' registers. I refer, in this connection, to a discussion by Lord Watson in *Colonial Bank v. Cady and Williams*, 15 App. Cas. 267, commencing with page 275.

The fact that there were two offices, one in Michigan and one in New York State where the shares could be effectively transferred, and any difficulty that might arise in determining which of these has priority over the other, if any, does not in my opinion give a local *situs* to the shares in Ontario. *Attorney-General v. Higgins* (1857), 2 H. & N. 339, is referred to as a classic case on this subject. There, in the case of domicile of a testator in England, and having in his possession shares in a railway company whose head office was in Scotland, and whose only register of shares was at its head office, it was held that the *situs* of the shares was in Scotland. Suppose the facts had been different to this extent that the railway company in question should have had a transfer office in Ireland where the shares could be transferred in addition to its head office in Scotland, could it be said that this would change the *situs* of the shares of the testator so that it could be held to be in England?

I am in agreement with the argument put forward by Mr. Rodd and cited by the learned Chief Justice, that it is for the defendants to take whatever course they may be advised to determine whether Michigan State or New York State is the *situs* of the shares, but being of opinion that in any event the local *situs* is not in Ontario, I am of opinion that the appeal should be allowed and the action dismissed with costs.

MASTEN J.A. (dissenting):—The appellants (defendants in the action) appeal from the judgment of Rose C.J.H.C. dated the 19th February, 1941, whereby he adjudged that the respondent (plaintiff in the action) should recover from the appellants, the executors of one Albert Theodore Montreuil, the sum of \$105,-313.98 as succession duty and interest; and whereby it was further adjudged that of the said sum of \$105,313.98 the sum of \$21,062.92 should be recoverable severally from each of the five individual residuary legatees (appellants) they being beneficiaries resident in the State of Michigan.

The facts are accurately and briefly summarized by the learned trial Judge as follows:

“The testator was domiciled in Ontario and the share certificates were in his possession in Windsor. The companies were companies organized under the laws of Michigan. They had their head offices in Detroit, but the shares were transferable not at the head office but at the offices of transfer agents, and

indeed the share certificates in the first instance were issued not from the company's head office but from the office of a company appointed for the purpose of such issue. In each instance the company whose shares in question had two of these transfer agents, one in Michigan and the other in New York. The transfer agents had equal authority. The shares that are in question could have been transferred either in Detroit or in New York. Neither company had any transfer office in Ontario."

The will is dated July 14th, 1936, and the testator died on October 2nd of the same year.

The provisions of the will of Albert Theodore Montreuil so far as relevant to the question arising in the present case are as follows:

"I give, devise and bequeath all my real estate of every kind and all my personal estate and effects whatsoever, not otherwise disposed of by this my will, unto my said trustees and the survivor of them in trust to make the following disposition thereof.

1. To pay to my sister, Cecile C. LePierre, of the said City of Windsor, two-fifths of the income from my said estate, during the term of her natural life.

2. To my sister, Matilda A. Selleck, of the Town of Riverside, in the County of Essex, three-fifths of the income of my said estate, during the term of her natural life.

3. Upon the death of either of my said sisters, I direct my trustees to pay the income, formerly paid or directed to be paid to said sister, to Marie Josephine Byrne, Frances Eugenie Byrne, Alfred George Thomczek, Louise Matilda Thomczek, Eugenie Thomczek, Florence Maisonville and Raymond Girardot or the survivors, in equal shares.

4. I empower my trustees to sell any of my real or personal estate as they may deem proper and to invest the proceeds thereof, and any such other moneys that form the corpus of my estate, which they may receive from time to time, in Dominion of Canada bonds, the income therefrom representing the income from the investment which they replace and shall become part of the income of my estate and be distributed as hereinbefore directed.

5. Upon the death of my remaining sister, I direct my said trustees to call in and convert into money the same or such part thereof of my estate as shall not consist of money and *to divide* the corpus and undistributed income among the said Marie

Josephine Byrne, Alfred George Thomczek, Louise Matilda Thomczek, Eugenie Thomczek, Frances Eugenie Byrne, Florence Maisenville and Raymond L. Girardot or the survivors, in equal shares.”

It is to be observed that the will does not bequeath his shares in specie; on the contrary he directs a conversion into money of his whole estate of which these shares form a part and bequeaths to each of the Michigan beneficiaries a deferred legacy consisting of one-seventh of the residuary fund arising from such conversion. The conversion is done by the executors and trustees to whom probate was issued by the Surrogate Court of Essex, and gives rise to a fund for which they are accountable in that Court.

Specimens of the share certificates in question are made part of the special case and read as follows:

“Number

DC 1

U

Shares

1,000

BRIGGS MANUFACTURING COMPANY.

“Incorporated under the laws of the State of Michigan.

“This certificate is transferable in the City of New York or in Detroit.

“This certifies that Albert T. Montreuil is the owner of one thousand fully paid and non-assessable shares, without any nominal or par value of the capital stock of Briggs Manufacturing Company, transferable in person or by duly authorized attorney upon surrender of this certificate properly endorsed. This certificate is not valid unless countersigned by the Transfer Agent and registered by the Registrar. Witness the seal of the Corporation and the signatures of its duly authorized officers.

Dated July 9th, 1936.

L. A. Lark, (Seal)
Secretary.

M. L. Briggs,
Vice-President.

Registered: July 9th, 1936.

National Bank of Detroit,
(Detroit) Registrar,

By ?

Authorized Officer.

Countersigned:

Detroit Trust Company,
(Detroit) Transfer Agent,
By ?
Authorized Officer."

"Number	Shares
CC0528	1,000

Incorporated under the laws of the State of Michigan.

PFEIFFER BREWING COMPANY.

Authorized capital 750,000 shares common stock no par value.

This certificates that Albert T. Montreuil and Evelyn H. Montreuil, as joint tenants with right of survivorship and not as tenants in common, is the owner of one thousand fully paid and non-assessable shares without par value of the common capital stock of Pfeiffer Brewing Company transferable only on the books of the Corporation by the holder hereof in person or by attorney, upon surrender of this certificate properly endorsed. This certificate is not valid until countersigned by the Transfer Agent and registered by the Registrar.

Witness the seal of the Corporation and the facsimile signatures of its duly authorized officers, dated June 28th, 1934.

Carleton S. Smith,	(Seal)	Frank J. Conrad,
Secretary.		President.

Registered: June 29th, 1934.

Union Guardian Trust Company,
(Detroit) Registrar,
By Chas. Boyle,
Authorized Officer.

Countersigned:

Detroit Trust Company,
(Detroit) Transfer Agent,
By ?
Authorized Signature."

For the respondent it is submitted that these certificates, physically located in Windsor in the actual possession of the testator domiciled and resident in Ontario, and the shares to which they relate, constituted during the testator's lifetime property of his situate in Ontario, (a) as pieces of paper; (b) as muniments of title to shares which, according to the terms of

the certificates were "transferable upon surrender of this certificate properly indorsed"; (c) because the beneficial interest of the testator in the shares was effectively saleable by him in Ontario.

The respondent further claims that the certificates and all rights arising out of them, together with the beneficial interest in the shares, passed on testator's death to his trustees and executors subject to the terms of the will as quoted above and that being property in Ontario at testator's death the interest passed in Ontario on his death.

The testator having died in 1936 the relevant statute is The Succession Duty Act of 1934, ch. 55, sec. 6(1) of which provides as follows:

"(1) All property situate in Ontario and any income therefrom passing on the death of any person, whether the deceased was at the time of his death domiciled in Ontario or elsewhere, and every transmission within Ontario owing to the death of a person domiciled therein of personal property locally situate outside Ontario at the time of such death, shall be subject to duty at the rates hereinafter imposed."

By subsec. (f) of sec. 2 of the Act, the term "passing on the death" is defined as follows:

"'Passing on the death' shall mean passing either immediately on the death or after an interval, either certainly or contingently, and either originally or by way of substitutive limitation, whether the deceased was at the time of his death domiciled in Ontario or elsewhere;"

Under the words of this statute the right of Ontario to recover succession duty depends on the answer to the question, "Did any property situate in Ontario pass on the death of Albert Theodore Montreuil?" for if it did then under this statute the Province has power to impose succession duty on that property.

I agree with the respondent's submissions that the share certificates, as physical assets and as muniments of title, constituted property of the testator situate in Ontario and which on his death passed in Ontario to his executors and trustees and I have nothing to add.

I desire, however, to discuss further the "passing" of the beneficial interest in the shares in question.

The present action was tried on a special case, agreed and signed by the solicitors for the plaintiff and for the defendants, respectively.

Paragraph 20 of the special case, after reciting the payments theretofore made to the plaintiff in respect to undisputed items of claim proceeds as follows:

"The plaintiff claiming, and the defendants denying, that the said shares (referring to the shares here in question) were at the death of the said deceased property situate in the Province of Ontario, and that succession duty was payable to the Province of Ontario thereon so far as the interests of the five persons resident in the State of Michigan are concerned."

"21. The question for the opinion of the Court is, were the said shares of capital stock of Briggs Manufacturing Company and Pfeiffer Brewing Company, property locally situate in the Province of Ontario at the death of the said Albert Theodore Montreuil for the purposes of the Succession Duty Act, and as so locally situate subject to succession duty?"

While the question was presented before us at the argument in the somewhat academic and metaphysical aspect involved in the question "What was the proper location of the share in question," yet I think that under the terms of the special case, as above quoted, we are at liberty to determine not any abstract question, but rather whether the legacies which passed to the appellant beneficiaries under the will of the testator arise out of property which at the death of the testator was situate in Ontario and passed as such on his death.

The words of the statute have been already quoted and need not be repeated.

The appeal raises an interesting question respecting the nature of a share. Is it an indivisible entity incapable of being dealt with except as a whole, that is by the combined concurrence of three parties, viz., the vendor, the purchaser and the company, or is it a bundle of mutual rights and obligations such that there may be an effective transfer as between the vendor and the purchaser of the beneficial interest in the share quite apart from any recognition of the purchaser by the company?

The question falls to be determined on the words of the statute of Ontario quoted above and not otherwise. Did property in Ontario pass on the death of the testator? The expression "passing on death" is not used in any technical sense further than is defined by the provision already recited. Lord Parker, in *Attorney-General v. Milne*, [1914] A.C., at p. 779, stated that it "is evidently used to denote some actual change in the title or possession of the property as a whole, which takes place at

the death, and it is absolutely immaterial to whom or by virtue of what disposition the property passes." This dictum appears to have been quoted with approval in subsequent judgments in the House of Lords and in the High Court.

There can be no question but that the testator, Montreuil, owned these shares in his lifetime; it is so stated in the special case; and I think it follows that he owned them as property locally situated in Ontario, where he lived and was domiciled; for there can be no question but that it was in his power as the registered owner of these shares and holder of the certificates to deal with them effectively in the Province of Ontario by selling the shares in Windsor, or elsewhere in Ontario, transferring them to the purchaser by endorsement of the certificates which were in his possession in Windsor, and handing over the certificates so endorsed to the purchaser. Having done that he had completely dealt with and disposed in Ontario of his whole beneficial interest in the shares.

In *Castleman v. Waghorn, Gwynn & Co.* (1908), 41 S.C.R. 88, at p. 96, Duff J. (as he then was) states the law as follows:

"Under an executory sale of shares in such a company the vendor undertakes to execute a valid transfer of shares which he has the right to transfer or to procure the execution of a valid transfer by somebody else who has the right to transfer them. He does not undertake, I think, to procure the entry of the vendee's name in the register. On that point I respectfully concur with the observations of Lord Blackburn (then Blackburn J.) in *Marted v. Paine*, L.R. 6 Ex. 132, at pp. 150 and 151, and with the decision of the Court of Session in *Stevenson v. Wilson*, [1907] Sessions Cases, at p. 445.

"On the contrary it is, I think, as stated by Lord Blackburn in the passage referred to, the duty of the vendee to procure the registration of himself or some other person as holder of the shares sold and thus to relieve the vendor from any burdens which may arise from the fact that the shares are registered in his name."

And, later, he adds, "the delivery of a share certificate accompanied by a transfer executed in blank by the registered holder may pass to the person receiving such documents 'a title legal and equitable which will enable the holder to vest himself with the shares,' " citing *Colonial Bank v. Cady* (1890), 15 App. Cas. 267. See also *Smith and Osberg Ltd. v. Hollenbeck*, [1939] 4 D.L.R. 119, and the note in Masten and Fraser, *Company Law*,

4th ed., at p. 245. There is nothing to prevent the executors after taking out probate in Essex from indorsing the certificates which are in their possession and so converting them into "street certificates", as they are called in commercial language.

No doubt a complete title to the shares cannot be acquired by a purchaser without going to Detroit or New York and procuring his registration as a shareholder in the proper office, and no doubt a prudent Ontario purchaser would inquire whether on applying for registration and a new certificate he would first be required to pay succession duties in Michigan or New York and the price of the shares would have to be adjusted accordingly. But all that has no bearing on the question, was there a beneficial interest in these shares which the testator in his lifetime and his executors and trustees after his death had power effectively to deal with as a commercial asset in Ontario?

Under these circumstances I am of opinion that the shares were in the lifetime of Montreuil property in Ontario which, on his death, devolved on his executors as property of Montreuil in Ontario.

On this broad and simple ground, I am clearly of opinion that apart altogether from the reasons stated by Rose C.J.H.C. in his judgment, and apart from the ground that share certificates are specialties, the shares in question constituted in fact property in Ontario which, under the terms of the will, passed as such in Ontario to his executors and trustees on his death.

I adhere to the opinion suggested in *Williams v. The King*, [1940] O.R. 403, viz., that a share certificate bearing the corporate seal of the company is a specialty.

The legal relationship of a shareholder to the company is created by an offer or application for a share and its acceptance by the company when the share is allotted. The result is a contract whereby the shareholder undertakes certain obligations to the company and the company on its part enters into a contract with the shareholder conferring on him a right to a proportionate part of the assets of the company, whether by way of dividend or by way of distribution of assets in a winding-up, and also a right to attend and take part in shareholders' meetings in such manner as is provided by the Act, Charter and by-laws.

In *Welton v. Gaffery*, [1897] A.C. 299, Lord Herschell said (p. 315): "It is quite true that the articles constitute a contract between each member and the company."

In *Borlands Trustee v. Steel Brothers etc.*, [1901] 1 Ch. 279, at p. 288, Farwell J. said: "A share . . . is an interest measured by a sum of money and made up of various rights contained in the contract including a right to a sum of money of more or less amount."

See also *Palmer Company Law*, 15th ed., at page 34, and 5 *Halsbury*, 2nd ed., par. 256, at page 142.

The share certificate which the shareholder is entitled by law to receive from the company evidences this obligation of the company, and being under the corporate seal is, in my opinion, a specialty obligation: *Re Drogheda Steam Packet Co. Ltd.* (1903), 1 Ir. Rep. 542; *Smith v. Cork & Bandon Ry. Co.*, Ir. Rep. 5 Eq. 65, 22 L.J.C.P. 198; *Re Artizans Land and Mortgage Corporation*, [1904] 1 Ch. 796; *Benson v. Benson*, 1 P. Wms. 130; *Buck v. Robson*, L.R. 10 Eq. 639.

If the share certificates in question are specialties then the shares which they evidence were locally situate in Windsor, where the certificates were found at the death of the testator: *Commissioner of Stamps v. Hope*, [1891] A.C. 476.

It is to be observed in this connection that in the case of *The King v. National Trust Company*, [1933] S.C.R. 670, the attribute of a specialty found in Ontario was held superior to a combination of head office and registration office in Quebec, with the result that the claim of Quebec to succession duty on bonds found in Ontario was negatived.

I should add that I agree with the view expressed by Rose C.J.H.C. that the existence of transfer offices in two places (New York and Detroit) weakens if it does not entirely destroy the foundation of the rule that the location of the shares should be determined by the place of registration and transfer.

This circumstance differs the present case from any and all of the decided cases, so that the rules and tests formulated in the old ecclesiastical courts are not applicable, and the solution of the question must be sought by a consideration of the words of the Ontario statute, of the existing circumstances and of the attributes of the property in question: *The King v. National Trust Company*, [1933] S.C.R. 670.

Not only so but the group of cases, of which *Attorney-General v. Higgins* (1857), 2 H. & N. 339, and *Brassard v. Smith*, [1925] A.C. 371, are outstanding representatives, relate to the right of taxation by way of probate duty which might in the present case

be imposed by the State of Michigan as a condition precedent to recognition in Michigan of the letters probate, and as a preliminary to the entry of the executors' names as shareholders in the transfer and registration. See the observations of Anglin J. in *Smith v. Provincial Treasurer, etc.* (1919), 58 S.C.R., at p. 584. These decisions fail to afford any assistance in determining *whether property in these shares passed in Ontario on the death of Montreuil.*

I think that the present question falls to be dealt with on the principle stated by Lord Dunedin in *Brassard v. Smith*, [1925] A.C. 371, at p. 376, where he says:

"In the present case Duff J., dealing no doubt with the 'no local situation' argument, said as follows: 'And the Chief Baron's judgment, I think, points to the essential element in determining *situs* in the case of intangible chattels for the purpose of probate jurisdiction as "the circumstance that the subjects in question could be effectively dealt with within the jurisdiction."' This is, in their Lordships' opinion, the true test, Where could the shares be effectively dealt with? The answer in the case of these shares is in Nova Scotia only, and that answer solves the question."

While it is true that the provincial legislature cannot apply the doctrine of *mobilia sequuntur personam* to fix the *situs* of intangible property within the province, it may nevertheless modify the maxims and practice derived from the ecclesiastical law by declaring that "*all property situate in Ontario*" shall be subject to succession duty.

It then becomes a question whether the beneficial interest in the shares in question coupled with the legal title and actual possession in Ontario of the share certificates constituted "property in Ontario".

In the present case, as already pointed out, the whole beneficial interest in the shares in question could, in my opinion, be effectively dealt with in Ontario by the testator in his lifetime and by his executors after his death, in accordance with the principles laid down in such cases as *Attorney-General v. Bouvens* (1836), 4 M. & W. 171; *Stern v. The Queen*, [1896] 1 Q.B. 211, and *Crosby v. Prescott*, [1923] S.C.R. 146.

I would dismiss the appeal with costs.

Appeal allowed with costs, MASTEN J.A. dissenting.

[HOGG J.]

McPherson et al. v. Smith et al.

Division Courts—Sale of judgment debtor's goods—Illegal and irregular acts of Division Court clerk and bailiff—Special damage sustained by judgment debtor—The Division Courts Act, R.S.O. 1937, ch. 107, secs. 165(2), 176 and 180—The Public Authorities Protection Act, R.S.O. 1937, ch. 135, sec. 10.

Under sec. 180 of The Division Courts Act, R.S.O. 1937, ch. 107, a clerk of a Division Court shall issue a transcript of a judgment upon the application of the person holding an unsatisfied judgment; such transcript should not be issued by the clerk of a Division Court upon his own mere motion.

Under sec. 165(2) of The Division Courts Act, execution should not be issued by a clerk of a Division Court without an express order from the party prosecuting the judgment or unless an authorization can be reasonably inferred from a course of business.

Where there is a defect of jurisdiction in a Division Court clerk who issues a warrant of execution to a bailiff of the Court, and where loss ensues to a person affected by such warrant because of the act of the Division Court clerk, the demand upon the bailiff provided in sec. 10(1) of The Public Authorities Protection Act, R.S.O. 1937, ch. 135 must be made and the bailiff alone is not to be sued but the clerk is to be joined in the action. The reason for this is that the responsibility for the loss should not fall upon the bailiff who merely carried out his duties properly, but should fall upon the clerk who issued the warrant improperly. However, where the bailiff as well has not carried out his duties and the loss suffered is actually due in considerable part to his acts, he is not entitled to the protection of sec. 10 of the Act, for he is not then in any danger as an innocent party.

AN action against a Division Court clerk and bailiff for damages with respect to the sale of certain goods and chattels.

The action was tried by HOGG J. without a jury at Barrie.

H. W. Grant, for the plaintiffs.

B. S. Marshall, for the defendant A. E. Smith.

A. Forbes, for the defendants T. D. C. McKinnon and Hector McKinnon.

September 9th, 1941. HOGG J.:—This is an action brought to recover damages and for the return of certain goods and chattels claimed by the plaintiffs upon the ground that owing to the illegal and irregular acts of the defendants, contrary to the provisions of The Division Courts Act, the plaintiffs sustained loss and damage.

On the 13th July, 1940, a judgment by default against the plaintiff J. D. McPherson for the sum of \$13.90 and \$5.59 for costs was entered in the 6th Division Court for the County of Simcoe by the defendant A. E. Smith, the clerk of that Court, at the suit of Jones Musical Store of Orillia. The plaintiffs claim that this judgment was entered contrary to the provisions of The

Division Courts Act and, was, as a consequence, null and void. A transcript of the judgment was issued from the 6th Division Court for the County of Simcoe to the 7th Division Court for the County of Ontario, of which latter Court the defendant T. D. C. McKinnon is the clerk.

The holder of the judgment, Hayden Jones, testified that he had given no instructions to have judgment signed nor the transcript of the judgment issued.

Section 180 of The Division Courts Act, R.S.O. 1937, ch. 107, provides that the clerk of a Division Court shall issue a transcript of a judgment upon the application of the person holding an unsatisfied judgment. Such transcript should not be issued by the clerk of a Division Court upon his own mere motion.

During the course of the trial, on consent of all parties, the action was dismissed without costs as against the defendant A. E. Smith.

On the 7th August, 1940, the defendant T. D. C. McKinnon issued an execution against the plaintiff James D. McPherson based upon the transcript of the aforesaid judgment, the execution being directed to the defendant Hector McKinnon bailiff of the 7th Division Court, the instructions endorsed upon the execution being to levy the sum of \$22.00 and the bailiff's lawful fees.

Section 165 of The Division Courts Act, subsec. (2), authorizes a clerk of a Division Court at the request of the party prosecuting the judgment, to issue an execution. It has been held that execution should not be issued by the clerk of a Division Court without an express order from the party entitled to it, or where from a course of business an authorization could be reasonably inferred: *Tuckett v. Eaton* (1884), 6 O.R. 486. No express order was given by the judgment creditor Jones for the issue of this execution nor was there any evidence of a course of business from which such authorization could be reasonably inferred. Under Division Court Rule 66(5), a book according to Form 4 of the Rules should be kept by the clerk in which all orders for executions shall be entered.

With reference to the defendant Hector McKinnon, the bailiff to whom the execution was delivered, the evidence shows that on the 8th August, 1940, he proceeded to a small cottage owned by the plaintiffs and looked through a window of this cottage, and at this time he stated he made a list or inventory of

the furniture in the cottage. On the same day, the bailiff posted up notices of sale of the furniture and chattels he had listed at several places in Simcoe county. The notice of sale states that the property which had been seized for execution and which was listed in the notice would be sold at public auction at the Orillia market square in the County of Simcoe on Saturday the 17th August at 10 o'clock in the forenoon.

The bailiff had no discussion with the judgment debtor as to whether all of the furniture listed in the notice of sale belonged to the judgment debtor or not. The bailiff also inserted notice of the sale in "The Orillia Packet and Times" newspaper.

It was not until after the hour advertised for sale on the 17th August that the defendant bailiff opened a window in the house which was vacant, entered the house through the window, and took the goods and chattels to Orillia, and the sale did not commence until 2 o'clock in the afternoon upon the date advertised.

According to sec. 176 of The Division Courts Act the notice of sale should be put up, and the sale itself held in the division where the property liable to be sold under the execution has been taken. The notices for sale were put up and the sale itself held, as has been stated, in the County of Simcoe and not in the County of Ontario where the goods were taken under the execution.

A "seizure" has been defined as "a forcible taking of possession": Bicknell and Seager's Division Court Manual, 1928 ed., p. 398. The bailiff did not take forcible possession of the goods until the 17th August, the very date of the sale.

By sec. 176 of the statute a public notice of sale must be given at least eight days before the time appointed for sale.

It appears from the evidence of the auctioneer who conducted the sale, and others, that not as many persons attended at the sale at 2 o'clock in the afternoon of the 17th August as were present at 10 o'clock in the morning, the hour advertised. The evidence also shows to my satisfaction that the sum of \$42.00, which was realized at the sale for the furniture in question, did not nearly approximate an adequate price for the goods which were sold. Some of the furniture sold did not belong to the judgment debtor. There is evidence, and I accept it as a fact, that the furniture and chattels so sold should have realized from \$150.00 to \$225.00 at public auction.

The whole course of procedure from the entry of judgment to the sale of the plaintiffs' furniture, and especially the manner in which the defendant bailiff Hector McKinnon acted with reference to the seizure and sale of the chattels in question, was irregular and wrong and contrary to the terms of the statute. He acted as he did through complete ignorance of his duties and was not actuated in any way by malice or ill feeling towards the plaintiffs.

The plaintiff J. D. McPherson was in the Canadian army at the time, and his wife, the plaintiff Elsie McPherson, was attempting to the best of her ability to have this small judgment debt settled and to save whatever she could of their few pieces of furniture.

There is no doubt in my mind that special loss or damage was suffered by the plaintiffs by the irregular acts above described.

The main ground of defence of the defendants McKinnon is based upon sec. 10 of The Public Authorities Protection Act, R.S.O. 1937, ch. 135. Subsection (1) provides that no action shall be brought against a constable, Division Court bailiff or other officer for anything done in obedience to a warrant issued by a clerk of a Division Court until demand has been made or left at his usual place of abode by the person intending to bring such action in writing signed by the person demanding the same, of the perusal and copy of such warrant and the same has been refused and neglected for six days after such a demand.

Subsection (2) provides that if an action is brought after such demand and compliance therewith against a bailiff or officer for any cause without making the justice or clerk who issued the warrant a defendant, on the production and proof of the warrant at the trial of the action judgment shall be given for the defendant notwithstanding any defect of jurisdiction in such justice or clerk.

Subsection (3) provides that if the action is brought jointly against such clerk and bailiff, on proof of such warrant, judgment shall be given for such bailiff or other officer notwithstanding such defect in jurisdiction. (The note or gloss opposite subsec. (1) of sec. 10, is, "Conditions of liability, 24 Geo. II, ch. 44, sec. 6 (Imp).")

A demand in writing was signed by the plaintiffs' solicitor, but a conflict arises in the evidence as to whether the defendant

Hector McKinnon saw this demand. It was placed upon a desk in Mr. Grant's office, when this defendant was asked for a copy of the proceedings and the execution. He states he did not see it, although he informed the solicitor that the execution was in the office of the clerk of the Court. It is difficult to conceive that the defendant did not see the written demand at this time, and I find that the demand was made according to the statute; but I do not think that such demand was necessary in this case, and in my opinion the defendant Hector McKinnon is not entitled to the protection afforded by the statute.

It is somewhat curious to note that the present sec. 10 of the statute reverts to the language, with little change, of the statute of Geo. II, but that in The Division Courts Extension Act (U.C.), (1853), 16 Vict., ch. 177, sec. 14, and in the Consolidated Statutes of Upper Canada of 1859 in The Division Courts Act, ch. 19, in secs. 195, 196 and 197, for the protection of bailiffs, after the words "defect of jurisdiction" the following words are added, namely, "or other irregularity in or appearing by the warrant." The said sec. 195 provides that no action shall be brought against a bailiff of a Division Court except upon demand. Section 196 provides that in case, after such demand and compliance therewith, an action is brought against a bailiff without making the clerk of the Court who signed the warrant a defendant, "then on producing or proving such warrant at the trial, the jury shall give their verdict for the defendant, notwithstanding any defect of jurisdiction or other irregularity in or appearing by the warrant."

The present statute eliminates the words "or other irregularity in or appearing by the warrant," and the present statute deals only with the matter where there is any defect of jurisdiction in the Division Court clerk. The phrase "defect of jurisdiction" is discussed in the House of Lords in *The Colonial Bank of Australasia v. Willan* (1874), L.R. 5 P.C. 417, where it is said that objections on the ground of defect of jurisdiction may be founded on the character of the constitution of the inferior Court, the nature of the subject matter of the inquiry, or the absence of some preliminary proceeding which was necessary to give jurisdiction to the inferior Court.

In order to bring the act of the defendant T. D. C. McKinnon, the Division Court clerk who issued the execution within the definition of "defect of jurisdiction", it must be concluded that

the requirement of sec. 165 of The Division Courts Act that the request of the party prosecuting the judgment to have the execution issue is a preliminary proceeding necessary in order to give the clerk jurisdiction to issue such execution.

Section 216 of The Division Courts Act provides that a person aggrieved on account of some irregularity committed by a bailiff may recover full satisfaction for the special damage sustained by him. A right is there given to proceed against a bailiff if special damage results from his irregular acts unless such right is taken away by sec. 10 of The Public Authorities Protection Act. Section 10 protects a bailiff who merely acts in the fulfilment of the duty placed upon him by the warrant of execution. If such warrant has been issued illegally by the clerk of the Court, but the bailiff proceeds in a proper manner to carry out his duties by virtue of such warrant, then the bailiff cannot be sued under sec. 10 until the demand, mentioned in sec. 1, is made upon him, and the clerk of the Court who issued the warrant is joined as a party to the action. I would refer to the old case of *Sayers v. Findlay* (1872), 12 U.C.Q.B. 155, decided while 16 Vict., ch. 177, sec. 14, above mentioned, was in force. In this case the bailiff was accused of acts of misconduct under a warrant of attachment or execution from a Division Court. Robinson C.J., who delivered the judgment of the Court, said, at p. 158: "There is no room for doubt, we think, that the statute 16 Vict., ch. 177, sec. 14, does extend to the case of a bailiff of a Division Court who has acted either under a warrant of execution or warrant of attachment. But this provision only applies where the action is for something for which the clerk would be liable as having issued an illegal process so that the burden can be shifted to his shoulders, and the plaintiff compelled to take his remedy against him and not against the bailiff where the latter has only acted in execution of the duty enjoined upon him by the warrant. Where the wrong complained of is the misconduct of the bailiff, and not anything illegal in the writ itself or in the act of granting it, then we take it to be settled that this enactment does not apply; and this, we took to be conceded upon the argument, is a case of that kind."

An older case which is of assistance in determining the scope of sec. 10 of The Public Authorities Protection Act, is that of *Pearson v. Ruttan* (1865), 15 U.C.C.P. 79. There it was held that the demand for perusal and a copy of the warrant is only

required in cases where defect of jurisdiction or other irregularity exists in or appears by the warrant in order that the clerk who issued the warrant and not the bailiff may be made liable. See also *Fergusson v. Adams* (1862), 5 U.C.Q.B. 194.

It would seem unreasonable to hold that because defect of jurisdiction appears in the action of the Division Court clerk therefore for this reason alone the demand must be made as provided by sec. 10 of the statute although the bailiff may be equally or to a greater extent responsible for the actual loss suffered on account of illegal acts on his part. The section is apparently designed to afford protection to a bailiff, or other officer acting in like capacity, who has only done his duty under the execution. It is true that in the present case, the plaintiffs seek to hold responsible not only the bailiff for his irregular acts, but also the clerk because of defect of jurisdiction in so far as he is concerned, but I do not think this circumstance makes the judgments in the *Pearson* case and the *Sayers* case inapplicable.

My opinion is that under the present statute, where there is a defect of jurisdiction in the Division Court clerk who issues the warrant of execution to the bailiff, and where loss ensues to a person affected by such warrant because of the act of the Division Court clerk, the demand upon the bailiff provided by the statute must be made, and the bailiff alone is not to be sued but the clerk is to be joined in the action—the reason being that the responsibility for the loss is not to fall upon the bailiff who merely carried out his duties properly but shall fall upon the clerk who issued the warrant improperly. But where the bailiff as well, has not carried out his duties and the loss suffered is actually due in considerable part to his acts, then he is not entitled to the protection of the statute for he is not then in any danger as an innocent party.

With respect to the argument of counsel on behalf of the defendant Hector McKinnon that it must be shewn that his misconduct was wilful as provided by sec. 14 of The Sheriffs Act, R.S.O. 1937, ch. 17, it may be remarked that as sec. 10 of The Public Authorities Protection Act is concerned with actions against a Division Court bailiff or other officer executing a warrant issued by a Division Court clerk, The Sheriffs Act is not concerned with such officer.

Counsel for the defendants also raised the point that under sec. 72 of The Division Courts Act, the action could not be brought in its present form. Section 72 has nothing whatever to do with such an action as is now before the Court. Section 72 deals with actions brought in a Division Court against a clerk or bailiff of such Court.

I have come to the conclusion that the plaintiffs suffered special damage to the extent of \$200.00 due to the act of the defendant T. D. C. McKinnon in issuing the execution contrary to the provisions of the governing statute and due to the manner in which the defendant Hector McKinnon acted in respect of the so-called seizure and sale of the plaintiffs' chattels.

This action should not have been instituted in this Court, and the costs, because of the limited amount of damages awarded, can only be those applicable to a suit in a Division Court.

Owing to the circumstances of the case, there should be no set-off to the defendants on account of costs. The counterclaim of the defendant Hector McKinnon was dismissed at the trial without costs.

I have dealt with the issues raised in this action at considerable length because I think it is of importance that unnecessary hardship should not be caused to persons against whom judgments may be recovered in Division Courts, many of such persons being in poor financial circumstances, by irregular acts on the part of officers of such Courts attributable to want of care and lack of understanding of their duties as laid down by the statute.

Judgment for the plaintiffs with costs.

[COURT OF APPEAL.]

Re Snowball.

Wills—Succession Duties—Meaning of clause in will that all estate and succession duties payable in respect of the testator's property shall be paid out of the residuary estate and that "all legacies or gifts bequeathed shall be free from inheritance tax"—Whether succession duty payable with respect to gifts inter vivos made by testator should be paid out of the residuary estate.

The testator in his lifetime made certain gifts *inter vivos* and by his will he declared "that all estate and succession duties payable upon or in respect of my estate or property shall be paid out of my residuary estate and that all legacies or gifts bequeathed shall be free from inheritance tax".

Held, that any succession duties payable in respect of the gifts *inter vivos* are not payable out of the residuary estate. The donor of a gift *inter vivos*, by making the gift, assumes no obligation whatsoever to the donee to make any provision for payment of succession duties that may become payable in respect of the gift upon his death. The words "my estate or property" in the will should not be interpreted as including whatever by The Succession Duty Act is included within the term "property passing on the death". Nor do the gifts *inter vivos* come within the meaning of the phrase "gifts bequeathed"; it is impossible to attribute to the testator an intention to use these words in any sense other than their common meaning of gifts by will.

AN appeal from an order of McFarland J. determining a question which had arisen in connection with the administration of the estate of George M. Snowball, deceased.

September 15th, 1941. The appeal was heard by ROBERTSON C.J.O., FISHER and McTAGUE JJ.A.

J. F. Boland, K.C., for the executor, appellant, said that all the gifts in question were completed before the date of death. As the will speaks from the date of death, the words "my estate or property" apply only to assets owned by the testator at the date of his death, and do not cover gifts *inter vivos*.

The words "all legacies or gifts bequeathed" apply only to legacies or gifts under the will and do not include gifts *inter vivos*.

Clause 9 of the will does not state that succession duty in respect of gifts *inter vivos* shall be paid out of the estate, and therefore succession duty in respect of these gifts should be paid by the respective donees: *Re Reading*, [1940] O.W.N. 9.

The testator is presumed to know the law, and if he wished to have the executor pay the succession duty on gifts *inter vivos*, he would have so expressed his intention.

G. R. Munnoch, K.C., for Elsie Alexandra Snowball *et al.*, residuary legatees, appellants, contended that a will speaks from the date of death, and therefore the words "my estate or prop-

erty" apply only to assets owned by the testator at the date of his death and exclude any gifts *inter vivos*: The Wills Act, R.S.O. 1937, ch. 164, sec. 26; *Re Hicks*, [1935] O.R. 535.

In declaring that all estate and succession duties shall be paid, testator refers to the property which he was competent to deal with at date of death. The will must apply to estate or property which he owned at time of his death. In that sense, therefore, these words exclude any intention on part of testator to impose the burden of paying succession duties on gifts *inter vivos* out of residuary estate. The word "bequeathed" in clause 9 is the keyword.

P. E. F. Smily, K.C., for Elizabeth Stewart, Isabel McArthur, respondents, contended that some meaning must be given to the word "property" in clause 9 of the will.

The testator is presumed to know the law and that succession duty is payable in respect to property whether passing under the will or by gift *inter vivos*; and he directed the executor to pay all succession duty. Therefore, the testator intended succession duty to be paid by the estate on gifts *inter vivos*.

As to will speaking from date of death, see *Re Karch* (1921), 50 O.L.R. 509, Middleton J. at pp. 511, 512: "The true rule is that *prima facie* a will speaks from the date of its execution except as regards the property comprised in it, the statutory provision [in The Wills Act] having only this limited effect"; *In re Chapman*, [1904] 1 Ch. 431.

The words "gifts bequeathed" may have a wider meaning than gifts by will.

P. D. Wilson, K.C., Official Guardian, for Joseph Lougheed, William Lougheed, infants, respondents, submitted their rights to the Court, and adopted the argument of Mr. Smily.

Cur. adv. vult.

September 27th, 1941. The judgment of the Court was delivered by ROBERTSON C.J.O.:—An appeal from the order of McFarland J., dated 23rd January, 1941, on a motion on behalf of Elizabeth Stewart, to whom deceased had made gifts in his lifetime, for the determination of the question whether the succession duties on gifts made by the deceased *inter vivos* should be paid out of the residuary estate.

The order of McFarland J. declared that upon the true construction of the will of the deceased "all succession duties pay-

able on gifts *inter vivos* in respect of property given by the deceased in his lifetime are payable and should be paid out of the residuary estate of the said deceased."

The will provides, in clause 9, as follows:

"(9) I declare that all estate and succession duties payable upon or in respect of my estate or property shall be paid out of my residuary estate, and that all legacies or gifts bequeathed shall be free from inheritance tax."

The testator died on the 2nd January, 1935. His will is dated 2nd August, 1934, and there is a codicil dated 28th September, 1934. Some considerable time before making his will the testator made substantial gifts to Elizabeth Stewart and Isabel McArthur, and also made gifts for the benefit of the infants represented by the Official Guardian. The executor paid all succession duties in respect of the property disposed of by the will, but made no statement to the Succession Duty Department and paid no succession duty in respect of the gifts *inter vivos*. The Department has now demanded payment from Elizabeth Stewart of \$5,914.19 for succession duties in respect of the gifts made to her by the testator in his lifetime, and has demanded certain interest and penalties in addition. From Isabel McArthur it has demanded \$3,064.54 for succession duties in respect of the gifts made to her by the testator in his lifetime, and certain interest and penalties in addition. It does not appear that any demand has yet been made in respect of the gifts *inter vivos* made for the benefit of the infants, but they stand in the same position as the gifts to Elizabeth Stewart and Isabel McArthur.

The whole question is whether, on the proper construction of clause 9 of the will, it is the duty of the executor to pay the succession duties on these gifts *inter vivos*. It is not disputed that by the provisions of the Succession Duty Act, 1934 (24 Geo. V, ch. 55) which is the Act that applies, the obligation to pay any duty in respect of such gifts *inter vivos* is imposed upon the donee. By subsec. (1) of sec. 6 "all property situate in Ontario and any income therefrom passing on the death of any person" is made subject to duty. By subsec. (2) of that section "property passing on the death of the deceased" includes "any property taken under a disposition operating, or purporting to operate, as an immediate gift *inter vivos*, whether by way of transfer, delivery, declaration of trust or otherwise, made since the 1st day of July, 1892." Then, by sec. 10, subsec. (1) "every

heir, legatee, devisee or donee, and every person to whom property passes, for any beneficial interest in possession or in expectancy, shall be liable for the duty upon so much of the property as so passed to him, and which is dutiable in Ontario according to the provisions of this Act."

The donor of a gift *inter vivos*, by making the gift, assumes no obligation whatsoever to the donee to make any provision for payment of succession duties that may become payable in respect of the gift, upon his death. If, in this case, the residuary estate of the deceased is to bear the burden of the succession duties claimed from the donees, it is because the testator has said so in clause 9 of his will.

It is argued for the donees that the succession duties now claimed are within clause 9 as "succession duties payable upon or in respect of my estate or property", and it is argued that the meaning of the words "my estate or property" should be extended to include whatever, by the Succession Duty Act, is included within the term "property passing on the death."

I can see no reason for so extending the meaning of the perfectly plain words of the will. The interpretation clauses of the Succession Duty Act are not incorporated in the will, and even if they were, the will contains no such words as the term "property passing on the death," to which sec. 6, subsec. (2), gives a very extended and artificial meaning.

It is further argued for the donees that the gifts *inter vivos* come within the expression "gifts bequeathed", which sec. 9 declares to be "free from inheritance tax", and a wide interpretation of the words is contended for as extending to all gifts made by the testator at any time, and in any manner.

I think there is no question that in our common usage a "gift bequeathed" means a "gift by will". No doubt the use of "bequeath" was at one time less restricted. Counsel quoted Shakespeare to prove it. The more modern Oxford English Dictionary says, however, that "to leave by will" is now "the only surviving sense of the word". We may well follow the decision in *Re Armstrong* (1879), 49 L.J. Ch. 53, where it was held that the ordinary meaning of "bequeathed" confines it to property taken by will, and "reject the poetical and figurative sense of the word in the quotations referred to in argument." It is impossible, in my opinion, to attribute to the testator any intention to use the words in the wider sense contended for.

To hold that the succession duties claimed by the Succession Duty Department from the persons to whom the testator made gifts *inter vivos* are payable out of the residuary estate, one must find in clause 9 a declared intention of the testator to make them a further gift of the amount of these duties. I can find no words in clause 9 that disclose that intention.

The appeal should be allowed, and it should be declared that upon the true construction of clause 9 any succession duties payable in respect of the gifts *inter vivos* are not payable out of the residuary estate.

As the proceedings were initiated by one of the donees, Elizabeth Stewart, I can see no ground upon which she should be relieved of the ordinary burden of unsuccessful litigation, and she should pay the costs of the executor both of the motion and of this appeal, and also the residuary legatees' costs of the appeal, they having been brought in on the appeal only.

*Appeal allowed with costs.**

* Subsequently on motion to vary the minutes of judgment as settled by the Registrar, the order as to costs was varied and the costs of all parties, other than Elizabeth Stewart, were directed to be paid out of the estate.

[COURT OF APPEAL.]

Bland v. The King et al.

Highways—Non-repair—Boulevard between vehicular lanes—Street car stop—Use of Boulevard by pedestrians—Duty to keep boulevard in state of repair—The Highway Improvement Act, R.S.O. 1937, ch. 56, sec. 75—The Highway Traffic Amendment Act, 1938, 2 Geo. V, ch. 17, sec. 8.

By sec. 75(1) of The Highway Improvement Act, R.S.O. 1937, ch. 56, "every portion of the King's Highway shall be maintained and kept in repair by the department". This does not mean that every portion of the highway must be kept in the same condition of repair for the use of travellers, and regard must always be had to the use that it is reasonable to expect will be made of the several parts of the highway, and they are to be kept in repair accordingly.

Where pedestrians used a boulevard on a divided highway for the purpose of walking from a street car stop to the sidewalk and the defendant should have reasonably expected such user, there was a duty on the defendant to keep the boulevard in such a reasonable state of repair that pedestrians might use it in safety. Hence, it was held that the presence of a depressed catch-basin on the boulevard which the engineers for the defendant admitted had been constructed without regard to the safety of pedestrians constituted a state of non-repair.

AN appeal by the plaintiff from the judgment of J. G. Kelly J. in so far as the plaintiff's action was dismissed as against the

King, in the right of the Province of Ontario, represented by the Minister of Highways.

September 18th, 1941. The appeal was heard by ROBERTSON C.J.O., FISHER and McTAGUE JJ.A.

T. N. Phelan, K.C., for the plaintiff, appellant, contended that there was not adequate lighting or warning to pedestrians at the place where the accident occurred. The course the plaintiff took was a normal one. The boulevard is part of the highway: *Jacob v. Town of Tilbury*, [1940] O.W.N. 367, 530.

The trial Judge held this was not non-repair, on the ground that the catch-basin, as the sewer is called, was erected in the best engineering practice; but that is not the point. This was the worst part of the highway to have such a trap: The Highway Improvement Act, R.S.O. 1937, ch. 56, sec. 75(1).

The duty of a municipality is to keep the highway in such condition that persons using the same with ordinary care may do so with safety: *Groves v. Wentworth*, [1939] O.R. 138, at p. 145.

For the standard of care necessary by a municipality in similar circumstances, see *Breen v. City of Toronto* (1910), 2 O.W.N. 87, 690; *Pow v. Township of West Oxford* (1908), 11 O.W.R. 115.

The public has the right to travel over the whole of the highway. Even in performance of statutory duty, the municipality must do construction work without negligence. This was not done by the defendant in this case.

As to the damages suggested by the learned trial Judge these were entirely inadequate in view of the serious fracture of the ankle sustained by the plaintiff.

D. J. Coffey, K.C., for the defendant, respondent, contended that the defendant was under no obligation to provide for an outlet for the Toronto Transportation Commission. The Commission should have built a walk.

This part of the boulevard cannot be a travelled portion, because there is restriction against traffic: The Highway Traffic Act, R.S.O. 1937, ch. 288, sec. 39a as added by 1938, Statutes of Ontario, ch. 17, sec. 8; and therefore there is no cause of action here.

There may be all sorts of obstructions on boulevard between highways, and over rough boulevard pedestrians should take care: *Breen v. City of Toronto* (1910), 2 O.W.N. 87, 690.

Reference also to *Rosen v. City of Kitchener*, [1935] O.R. 522 (boulevard portion of a highway planted with trees and grass is, however, capable of being used by the public as a highway only in a restricted sense) and *Belling v. City of Hamilton* (1902), 3 O.L.R. 318 (municipality not required to keep in perfect repair).

There was no non-repair of the highway. If a pedestrian uses a part of the highway which is not the usual part, he does so at his own risk: *Stearns v. United Counties of Stormont, Dundas and Glengarry* (1926), 30 O.W.N. 245.

According to evidence of engineers the catch-basin in its present location is in the best engineering practice; therefore there was no negligence: *Trueman v. The King*, [1932] O.R. 703.

There was plenty of light at this particular spot. There is large space between the two highways, with trees and undulations; one part of it cannot be part of travelled portion and the rest not.

The damages suggested by the trial Judge were reasonable upon the evidence.

Cur. adv. vult.

September 30th, 1941. The judgment of the Court was delivered by ROBERTSON C.J.O.:—This is an appeal from the judgment of Kelly J., dated 9th May, 1941, in so far as it dismissed the plaintiff's action against the Province.

The action was for damages alleged to have been caused by non-repair of a provincial highway. The learned trial Judge held that the highway was not out of repair, and that if there was any negligence, it was the plaintiff's negligence.

The accident occurred a short distance west of the Humber River, and on the highway that is close to the lake shore. The provincial highway at this point appears to be, for a short distance, a combination of the highway formerly known as the "Toronto-Hamilton Highway", (now known as Highway No. 2), and the more recently constructed highway known as the "Queen Elizabeth Way" which separate a little farther west, on the way to Hamilton. It is a divided highway, that is, there are two traffic lanes for vehicular traffic, one on the north carrying the west-bound traffic, and one on the south, carrying the east-bound traffic. Between these traffic lanes are first, to the south of the

traffic lane for west-bound traffic, the double tracks of the Toronto Transportation Commission. Then next to the south is a grass boulevard which extends southerly to the north curb of the east-bound traffic lane. To the south of the east-bound traffic lane is a sidewalk, on the south side of which front a number of restaurants and shops and other places to which the public resort.

A street car stop is indicated on a light standard at a point on the north side of the grass boulevard, and a macadam platform is provided there for the convenience of passengers getting on or off the street cars. Towards the easterly end of this platform, and about 9 feet to the south of it, is a catch-basin for draining the surface water from the boulevard. The grating on the top of the catch-basin is something more than 6 inches lower than the level of the boulevard. It is the placing of the catch-basin at this place, and below the surface of the boulevard, that it is alleged caused the condition of non-repair complained of.

At about 10.30 in the evening of 17th January, 1941, appellant, in the company of his wife and two friends, having an appointment to meet some others at a restaurant fronting on the south side of the highway, alighted from an east-bound street car on the platform on the north side of the boulevard already referred to, and proceeded to cross the boulevard to the sidewalk on the south side of the highway. The ground had a covering of snow which concealed the depression over the catch-basin. Appellant stepped into this depression and sustained a fracture and a partial dislocation of his left ankle.

There is no question that the place where the accident occurred is part of a provincial highway. It is not conceded, however, that it is a travelled part of the highway, or that it was intended to be used for pedestrian traffic.

By sec. 75, subsec. (1) of The Highway Improvement Act, R.S.O. 1937, ch. 56, it is provided that "Every portion of the King's Highway shall be maintained and kept in repair by the Department". This is subject to some limitation that is not relevant here. By subsec. (2) it is provided that "In case of default by the Department to keep any portion of the King's Highway in repair, the Department shall be liable for all damages sustained by any person by reason of such default". The terms of these provisions are very like the provisions of sec. 480 of The Municipal Act. The latter Act does not say that every portion of the highway shall be kept in repair, but I do not think

these words really create any wider obligation than the provision of The Municipal Act, that every highway shall be kept in repair. I think the reason for using in The Highway Improvement Act the words "every portion", is merely to make it plain that the Department is made responsible, not for the paved portion alone, but for the whole highway, and that no part of it is left to be taken care of by the municipality that had had jurisdiction over it. In any event, to say that every portion of the highway shall be kept in repair does not mean that all of it must be kept in the same condition of repair for the use of travellers. Regard is always to be had to the use that it is reasonable to expect will be made of the several parts of the highway, and they are to be kept in repair accordingly. The question, therefore, with respect to this boulevard is whether, having regard to the use commonly made of it, or that reasonably it should be expected would be made of it, it was in a state of non-repair.

Counsel for the respondent contended that the boulevard was not intended for travel at all, and he referred to sec. 8 of The Highway Traffic Amendment Act, 1938 (2 Geo. VI, ch. 17). This section added sec. 39(a) to The Highway Traffic Act, and subsec. (1) reads as follows:

"(1) When a highway has been divided into traffic lanes by an unpaved portion lying between two parallel paved roadways, no person shall operate or drive any vehicle or lead, ride or drive any animal,—

"(a) along or upon such highway except upon the roadway on the right-hand side, having regard to the direction in which such vehicle is being operated or drawn or such animal is being led, ridden or driven; or,

"(b) on, over or across the unpaved portion of such highway except at those points where crossings are marked or provided."

It is to be observed, however, that there is nothing in this provision that restricts the use by pedestrians of any portion of a divided highway. The boulevard was open to pedestrians to go upon it lawfully. The more serious question is whether respondent should reasonably have expected that pedestrians would use the boulevard at this place as a way to the sidewalk to the south, as appellant did.

The presence of the street car stop sign and of the platform for passengers was a plain indication that pedestrians were invited to go to and from the platform. A platform at this location

was in contemplation, according to the evidence, before the boulevard was constructed or the catch-basin in place. No sub-way or overhead bridge is provided to carry persons using the platform from or to a sidewalk. Anyone alighting from a street car on the platform and, like the appellant, desiring to go to a shop or restaurant on the south side of the highway had no other convenient way of reaching the sidewalk, except by crossing the boulevard. There was no sign or barrier to warn such a person that it was unsafe or otherwise improper for him to walk directly across the boulevard. In fact that would seem to be his safest as well as the shortest route.

There is evidence that what the appellant did had been done by many others before him, and while there may not have been any one track in general use, for the platform seems to be about 50 feet long, it was a common practice to go directly across from the landing platform, over the boulevard to the sidewalk on the south side of the road. I am of opinion, therefore, that this was a part of the highway that reasonably the respondent should have expected would be used, and that was in fact used for travel by pedestrians, and that the respondent was therefore required to keep in such reasonable state of repair that they might travel in safety.

The learned trial Judge has not found anything to the contrary of what I have said. In his opinion, however, the highway was not out of repair by reason of the depression over the catch-basin where the appellant was injured. Evidence was given by engineers called by the respondent that a catch-basin was necessary at this place for the proper surface drainage of the boulevard, and to prevent water from the boulevard escaping onto the roadways, and that the catch-basin was properly constructed. It is important, however, to note that in the location and construction of the catch-basin no consideration was given by respondent's engineers to the use of the boulevard for travel by pedestrians. Mr. D. G. Ramsay, the divisional engineer for the Department of Highways under whose supervision the catch-basin was located and constructed, gave evidence as follows:

"Q. And did it never occur to you at the time that, constructing a boulevard of that type, people might when they got off a street car think that they had the right to use that boulevard? A. Well, frankly, it did not occur to me, no.

"Q. It never occurred to you? A. No.

"Q. You knew, did you, at the time you constructed this boulevard, that there were a number of large places on the south side of the highway? A. Yes.

"Q. The National Sporting Club, the Humber Hotel, Brooker's? A. Yes.

"Q. Other places along there? A. Yes.

"Q. And did it ever occur to you, with the street cars stopping at this particular place, that some of the passengers might go straight across the boulevard? A. Frankly, I did not give consideration to that."

It may well be that for the purpose of collecting and carrying off surface water from the boulevard a catch-basin at or near this location was necessary, and a good engineering job was done. The location of the street car stop and platform for passengers was well known, however, and unless something was done to prevent it, it was reasonably obvious that passengers would take the shortest and most convenient way to the sidewalk and would cross the boulevard at this place. At the time of the accident in question the catch-basin was concealed by the covering of snow, a condition that would frequently be present. There was no sign or guard-rail or anything else to warn pedestrians or to prevent them stepping into this depression as if it were level ground. In my opinion it was not enough for the respondents' engineers to testify to the need for a catch-basin and to commend the manner of its construction. They overlooked the pedestrian who might be expected to walk there and whose safety was to be considered. Admittedly, it was not considered nor provided for, and in this, in my opinion, the respondent was in default. With but little trouble and expense it should have been possible, by altering the position of either the catch-basin or the railway platform, to remove the catch-basin out of the direct line of travel from the platform to the sidewalk, or if that was not thought practicable or wise, then to provide some barrier or warning for the protection of pedestrians. Nothing was done, not because nothing could be done, but because the pedestrian admittedly was not thought of.

With great respect, therefore, I am of the opinion that the finding of the learned trial Judge that there was no condition of non-repair, must be reversed, and it must be found that the highway at the place of the accident was out of repair, and that this was the cause of the appellant's injuries.

Some argument was addressed for the respondent based upon the amendment made to The Highway Improvement Act, in 1939, by sec. 6 of ch. 19 of the statutes of that year. A subsection was added to sec. 75 of The Highway Improvement Act which is similar in its terms to the amendment made to sec. 480 of The Municipal Act, which was considered in *Jacob v. Town of Tilbury*, [1940] O.W.N. 367 and 530. I do not think it is necessary to say anything more on that matter than was said in the judgments in that case. The place of the accident was within the travelled portion of the highway.

There remains the matter of damages. The learned trial Judge considered that \$1,035.38 would be an adequate amount to award for damages. This was made up of \$535.38 for out-of-pocket expenses, including loss of wages, and \$500.00 for pain and suffering. The learned trial Judge having dismissed the action, I do not think we are bound to accept his estimate of the damages, although no doubt his opinion on the matter is entitled to respect. I venture to think, however, that he has under-estimated the amount that the appellant is fairly entitled to for the physical consequences of his injury. It is to be borne in mind in connection with injuries such as appellant sustained that there is something more to be considered than pain and suffering during the process of healing. No matter how good a job the surgeon may have done, and although there may be no permanent consequences amounting to disability, yet an injury of the character sustained by the appellant is not to be lightly regarded so far as the future is concerned. In my opinion the amount of damages awarded the appellant should be increased to the sum of \$1,535.38.

The appeal should be allowed with costs, and judgment should be entered for the appellant for the sum of \$1,535.38 and costs of action.

Appeal allowed with costs.

[COURT OF APPEAL.]

Johnston v. Givens.

Landlord and tenant—Lease of apartment—Covenant by landlord to heat—Breach of covenant—Right of tenant to terminate lease—Action by landlord for rent.

A lease of a suite in an apartment house contained a covenant by the landlord to heat the premises. The landlord failed to heat the premises in accordance with the terms of the covenant and the tenant before the expiration of the term vacated the premises because of the breach by the landlord of the covenant to heat.

Held, (1) The landlord's covenant to heat the premises did not go to the whole consideration for the tenant's promise to pay rent, and the tenant was not entitled to terminate the lease because of the breach of the landlord's covenant to heat.

(2) The failure of the landlord to heat the premises was due to fortuitous mechanical difficulties in connection with the heating equipment, and there was no intention on the part of the landlord that the tenant should be forced to leave the premises. Hence, in law there was no eviction of the tenant by the landlord.

(3) The landlord re-let the premises at a lower rent not having given notice to the tenant that he was re-letting on the tenant's account. The landlord was entitled to recover rent to the date when he re-let the premises, but not for the deficiency thereafter, and the tenant was entitled to recover damages for breach of the covenant to heat.

AN appeal by the plaintiff from a judgment of His Honour Judge Lovering, of the County Court of the County of York, dismissing the plaintiff's action with costs.

September 19th, 1941. The appeal was heard by ROBERTSON C.J.O., FISHER and McTAGUE JJ.A.

C. R. Bigelow, for the plaintiff, appellant.

F. R. Hume, for the defendant, respondent.

October 30th, 1941. The judgment of the Court was delivered by ROBERTSON C.J.O.:—An appeal from the judgment of Judge Lovering of the County Court of the County of York, dated 21st April, 1941, dismissing the plaintiff's action with costs.

The action is by a landlord for rent. By lease dated 8th September, 1939, the plaintiff let to the defendant a suite in an apartment house on Chatsworth Drive, in Toronto, for the term of two years, to be computed from 1st October, 1939, at a rental of \$70 per month. The premises were expressly let for use and occupation as a private dwelling, for the sole occupancy of the lessee and his immediate family, and for no other purpose. The lease, which is made in pursuance of the Short Forms of Leases Act, contains many special covenants. Among them is a covenant by the lessor during the continuance of the term, between the 15th day of October and the 1st day of May in

each year of the term to provide or procure to be provided, suitable means of heating, and furnish, or procure to be furnished, heat in the demised premises up to a reasonable temperature, for the reasonable use thereof by the lessee, in such manner as is possible with the existing heating equipment. There is also a covenant by the lessor to supply hot water for domestic purposes. There is the usual covenant by the lessor for quiet enjoyment.

The lessee took possession at the beginning of the term, and continued in possession until the end of November. He paid the rent for the two months of October and November. During the time of his occupation he made many complaints that the lessor failed to live up to representations made during the negotiations for the lease, and to perform covenants contained in the lease itself. The most serious of these complaints was that the lessor failed to heat the premises, and to supply hot water for domestic purposes, according to the covenants in the lease. At the end of November the lessee vacated the leased premises and refused to pay any more rent. In April of the following year the lessor found another tenant for the apartment at a slightly reduced rent. He then brought this action for the rent accrued for the time the premises were vacant, and for the amount by which the monthly rent received from the new tenant fell short of the rent reserved by the lease in question up to the bringing of the action.

The trial Judge accepted the evidence of the lessee and his wife in respect to the failure to supply heat and hot water for domestic purposes. He found that the conditions of which they complained were drawn to the attention of the landlord many times, and were not remedied, and that the neglect of the landlord gave rise to a condition in the premises that was injurious to the health of the occupants, and caused them considerable discomfort. He held that on these grounds the defendant was justified in vacating the premises as he did, and dismissed the action.

It is not entirely clear upon what legal principle the learned County Judge proceeded in holding that the landlord's claim for rent was defeated. He begins his reasons for judgment as follows:

"I find that the landlord made representations to the tenant with respect to heating and the supply of hot water with which he did not comply, and that these representations were conditions precedent to the taking possession of these premises by the tenant."

He then proceeds to deal briefly with the facts substantially as I have stated his findings of fact, and continues, "I believe on the evidence and on my interpretation of the contract between the parties the defendant was justified in vacating the premises as he did."

If the learned trial Judge based his judgment for the defendant upon representations prior to the lease it is sufficient to say that no such case was made either on the pleadings or in evidence. The defence, so far as failure to supply heat and hot water for domestic purposes was concerned, was rested upon the terms of the lease itself and upon nothing else. I think that is the defence that we must deal with.

The landlord's obligation to supply heat and hot water arises from contract. Beyond question, no one could live in the apartments in the winter time if they were not heated, and the only means of heating was the furnace in the landlord's control. The lessee knew that when he accepted the lease and protected himself by the covenant of the landlord already referred to. What is his remedy when the landlord has failed to fulfil the covenant?

The landlord has protected himself in respect of the tenant's breaches of covenant by a proviso for re-entry by the lessor on non-payment of rent or non-performance of covenants. There is no provision giving a corresponding remedy to the tenant against the landlord's breaches of covenant.

The rule is of general application that in default of any express provision to that effect the landlord's breaches of covenant do not entitle the tenant to declare the lease at an end. The landlord's covenant to heat the premises does not go to the whole consideration for the tenant's promise to pay rent. The tenant had still vested in him the interest in the premises created by the lease, and it cannot be said to be without any value for there are several months in each year in which the premises would be habitable notwithstanding the landlord's failure to supply heat. The term and the obligation to pay rent continue notwithstanding the landlord's breach of covenant. This is the

principle established in *Surplice v. Farnsworth* (1844), 7 Man. & Gr. 576: see the references to that case in *Johnstone v. Milling* (1886), 16 Q.B.D. 460, at p. 474, and *Hart v. Rogers*, [1916] 1 K.B. 646, at p. 651.

A case such as the present is to be distinguished from cases where, in the letting of furnished houses or apartments, an undertaking is implied on the part of the lessor that they are reasonably fit for the purpose of habitation. There is here no room for implying any covenant or promise in respect to supplying heat, for the written lease contains what was agreed upon. And there is the further distinction that the covenant to supply heat at certain times during the term cannot by any process be translated into a promise or undertaking as to the condition of the premises at the time of letting.

Counsel for the respondent contends, however, that there has been an eviction by the landlord. There has, of course, been no physical expulsion of the tenant from the premises—that is not what counsel contends. What he relies upon is put this way in *Upton v. Townend* (1855), 17 C.B. 30, at pp. 64-65: "Getting rid thus of the old notion of eviction, I think it may now be taken to mean this—not a mere trespass and nothing more, but something of a grave and permanent character done by the landlord with the intention of depriving the tenant of the enjoyment of the demised premises."

The difficulty in finding such an eviction here is the absence of evidence of intention on the part of the landlord. The heating equipment was good. There was enough coal, and it was good coal, and there was an automatic stoker. The trouble was this—to prevent foreign substances being fed into the mechanism of the stoker with the coal and doing injury, shear-pins were so placed that any harmful foreign substance entering the automatic stoker would come in contact with the shear-pins and break them off; thereupon the automatic-stoker ceased to operate until the broken shear-pin was replaced. There would have been no serious trouble if there had been some one at hand who would quickly notice when the stoker was out of operation and would be able to put things right again. There was a janitor, but he had not only this apartment-house to look after, but several others. They were all small apartment-houses, and probably for most purposes the services of one janitor were

enough for all of them. There were, however, in the few weeks of respondent's occupation after the furnace went on, at least four occasions when the apartment was without heat for many hours at a time. The causes were in every case of an accidental nature. On one occasion a piece of glass was in the coal and sheared off one of the pins. On another occasion a stone in the coal was the cause. When or how these things got into the coal no one knows. Their presence there was not known, and it is said that it is quite unusual that such things should happen so frequently. There was, however, no janitor about to detect the trouble when it happened, with the result that the furnace went out of operation, and after a time the occupants, wanting heat, had to set about finding some one to look after things, at times without any great measure of success.

I am unable to find in these occurrences, injurious as they were to the respondent's enjoyment of the demised premises, any evidence of an intention on the part of the landlord that they should have that effect, or indeed, that they should happen at all. They were fortuitous events, and while the landlord and not the tenant should be the one to lose by even an accidental breach of the landlord's covenant, it is impossible to find that these were acts of a permanent character done by the landlord with the intention of depriving the tenant of the enjoyment of the demised premises.

In the result, it must be held there was no eviction and that the respondent had no right to treat the lease as at an end, and to refuse to pay rent.

The learned trial Judge dismissed a counterclaim of the respondent for "damages for moving costs, pain, suffering and inconvenience to himself and his family" arising from being forced to vacate the premises. The respondent has not appealed from that dismissal. It does not seem a satisfactory way to dispose of this case to compel the tenant to pay rent for the time he was out of occupation until the landlord re-let the premises, and to give him no redress for the landlord's breach of covenant. The tenant of a leased suite of apartments is in a difficult position if the landlord fails to heat them to a livable temperature. The tenant can no doubt refuse to enter into a lease that does not adequately protect him, and the Court cannot make a new contract for him. Whether, in circumstances

such as this respondent found himself in, the Court would find a case for a mandatory injunction against the landlord within the principle first laid down in *Lane v. Newdigate* (1804), 10 Ves. 192, may some time have to be considered. The only remedy now available to this respondent must be in damages, and in my opinion that remedy should be left fully open to him notwithstanding the dismissal of the counterclaim. It should, therefore, be a term of the allowance of this appeal and of the judgment to be entered for the appellant, that there is reserved to the respondent any right to damages he may have had arising from the breach by appellant of any of the covenants in the lease.

There remains for consideration the amount of appellant's claim. In my opinion appellant is entitled only to rent up to the time when the premises were re-let. The act of re-letting put an end to the lease. In some of the text-books it is said that there is an exception to the rule that the landlord cannot recover rent from the time of re-letting, in case the landlord gives notice to the tenant that he is re-letting solely on the latter's account (see Foa on The Law of Landlord and Tenant, 5th ed., p. 621). *Walls v. Atcheson* (1826), 3 Bing. 462, is commonly cited for this proposition, but the case does not really decide that. The lessor was held not entitled to recover in that case, and there is a mere dictum "that she ought to have given the defendant notice, if her intention was to let the apartments solely on his account." No such notice was given in the present case, and the appellant is therefore not entitled to anything to compensate him for having re-let at a smaller rent.

The appellant should, therefore, have judgment for rent at \$70 per month from 1st December, 1939, to 15th April, 1940, but reserving to respondent the right to damages for breaches of covenant, as already stated. The appellant is also entitled to his costs of action and of the appeal.

Judgment accordingly.

[COURT OF APPEAL.]

North-West Casualty Co. et al. v. Fritz.

Insurance—Automobile—Action by insurer against insured to recover moneys paid by insurer to third party—Alleged breach by insured of statutory condition—Driving while intoxicated—Settlement by insurer of claim made by third party—Effect of non-waiver agreement between insurer and insured—The Insurance Act, R.S.O. 1937, ch. 256, sec. 205.

An insurer under a policy of automobile insurance brought this action against the insured to recover moneys paid by the insurer to a third party in settlement of a claim made by the third party arising out of an accident involving an automobile driven by the insured. The insurer in this action contended that the insured was intoxicated at the time of the accident and that, therefore, there had been a breach of one of the statutory conditions.

Held that the insurer could not recover from the insured for the following reasons:

1. The insurer had no right to recover against the insured under sec. 205 of the Insurance Act, R.S.O. 1937, ch. 256, because before this statutory provision can be successfully invoked to seek reimbursement the liability of the insured to the third party must have been ascertained by a judgment: *Merchants Casualty Insurance Company v. Waterloo Trust and Savings Company*, [1936] O.R. 67; *Guildhall Insurance Company v. Denny*, [1937] O.R. 361.
2. Although before the claim of the third party was settled the insurer and the insured entered into a non-waiver agreement, the terms of the agreement merely preserved the legal rights of the insurer and did not include a right to enforce reimbursement against the insured.

AN appeal by the defendant from a judgment of Urquhart J. in favour of the plaintiffs.

October 14th, 1941. The appeal was heard by MIDDLETON, McTAGUE and GILLANDERS JJ.A.

D. F. Hall, for the defendant, appellant.

T. J. Agar, K.C., for the plaintiffs, respondents.

October 30th, 1941. The judgment of the Court was delivered by GILLANDERS J.A.:—An appeal by the defendant from a judgment of the Honourable Mr. Justice Urquhart, dated May 27th, 1941. The respondent insurance companies issued to the defendant an automobile insurance policy against, *inter alia*, public liability and property damage within certain limits. During its currency defendant was involved in an accident causing bodily injury and property damage to third parties, who made claims therefor.

In the course of investigating the matter, the plaintiffs found evidence indicating that the defendant was intoxicated at the time of the accident. Thereupon the plaintiffs' solicitors submitted to the defendant what is called a non-waiver agreement, to which further reference will be made. The defendant, after

taking advice from his own solicitor, signed this, as did the plaintiff companies. Being of opinion that the accident was caused by the negligence of the defendant, and realizing that whether or not there had been a breach of the conditions of the policy after issue they might become liable to the claims of third parties by virtue of the provisions of The Insurance Act, R.S.O. 1937, ch. 256, sec. 205, subsecs. 1 and 2, the companies proceeded to negotiate settlement of the damage claims. Before completing the settlements, plaintiff's solicitors wrote the defendant pointing out to him that the evidence gathered in the investigation suggested that at the time of the accident he was so intoxicated as to be incapable of properly controlling his automobile, and was therefore guilty of a breach of the policy contract. The letter proceeded to indicate terms on which claims would be settled, and notified him that the plaintiffs proposed to conclude the settlements after a limited time, and later seek reimbursement from him unless he saw fit to effect settlements direct.

Defendant did nothing, and the plaintiffs completed settlement of the claims, on the basis outlined in the letter, and then commenced this action for reimbursement of the moneys so paid.

There was no contest at the trial, nor on the appeal, as to the settlements being improvident or unreasonable and the trial Judge has indicated that from the evidence before him they appeared reasonable and justified.

At the trial the main, if not the only matter seriously contested was whether or not the defendant was, at the time of the accident, so intoxicated as to be incapable of properly controlling his automobile. In his reasons for judgment the learned trial Judge carefully considered the evidence on this issue, analyzing it and indicating in some detail that which he accepted and on which he relied. On this issue he found that the defendant was so intoxicated at the time of the accident, as to constitute a breach of statutory condition No. 2, incorporated in the policy contract, and gave judgment in favour of the first named company for \$1,307.50, and for the second named plaintiff company for \$321.29, with costs of action.

On the appeal it was ably urged that accepting all the evidence relied upon by the learned trial Judge, this was insufficient on which to base such a finding involving as it does a finding

that the defendant was guilty of a criminal or quasi criminal act. While there is no doubt that under these circumstances there is a heavy onus on the plaintiffs I am of opinion that the evidence was sufficient to warrant the conclusion at which the learned trial Judge arrived and his findings of fact should not be disturbed. However although the point was not argued at the trial, counsel for the appellant contends that in any event the respondent companies have established no right to reimbursement for the moneys paid out in settlement of the third party claims.

The Insurance Act, sec. 205, subsec. 6, places a statutory liability on an insured to pay or reimburse the insurer any amount which the insurer has paid "by reason of the provisions of this section which it would not otherwise be liable to pay." This must be read with subsecs. 1 and 3, which in effect place an absolute liability on the insurer, within certain limits, to the claims of third parties. Before this statutory provision can be successfully invoked to seek reimbursement, the liability of the claimant must be ascertained by a judgment, *Merchants Casualty Insurance Co. v. Waterloo Trust and Savings Company*, [1936] O.R. 67. But a judgment entered on consent may establish sufficient foundation: *Guildhall Insurance Co. v. Denny*, [1937] O.R. 361.

In the case at bar no judgment was obtained, in fact no action was ever commenced, and Mr. Agar does not rest his claim to reimbursement on the provisions of the Statute, but relies on the agreement between the parties which has been called a non-waiver agreement made on the 28th of September, 1940. This is in form somewhat different from that often made between an insurer and an insured under similar circumstances. It is desirable that it should be set out in full.

"NON-WAIVER AGREEMENT.

In the matter of an accident which occurred on the 27th day of August, 1940, on No. 2 Highway about 5 miles east of Napanee, Ontario, involving (assured) W. T. Fritz of (address) R.R. 2, Brighton, Ont., and (other party) J. R. Ward and B. Beckstead of (address) R.D. 2, Adams, N.Y.

It is understood and agreed by and between the parties hereto that the (company) Northwest Casualty Company and The Northwestern Mutual Fire Assoc. may investigate the circum-

stances surrounding the above accident, carry on negotiations, make a settlement or settlements or defend any action or actions that may be brought against us or either of us or pay any judgment or judgments against us or either of us without prejudice to the rights of any of the parties hereto under a policy of (class) liability insurance issued by the (company) Northwest Casualty Company and The Northwestern Mutual Fire Assoc. and the parties hereto agree, for themselves, their heirs, executors, administrators, successors and assigns, in consideration of the foregoing, that they and each of them will not in the said action or actions or in any action or actions that may be brought between or among any of the parties hereto plead or contend that the (company) Northwest Casualty Company and The Northwestern Mutual Fire Assoc., by conducting the said investigations or the said negotiations or defences or by making the said settlement or settlements or by payment of the said judgment or judgments, created any estoppel or waived any of its legal rights to refuse payment or indemnity under the said policy of insurance or any of its legal rights to recover from us or either of us the amount or amounts of settlement or settlements made or any judgment or judgments paid by it.

"In witness whereof the parties hereto have duly executed these presents on the 28th day of September, 1940.

Signed, sealed and delivered
in the presence of:
"A. H. MacConnell".
"S. E. Bones".

Assured: "W. T. Fritz".
Company: "D. G. McPherson",
Chief Agent for Ontario,
Northwestern Fire Association,
Northwest Casualty Company."

The effect of this agreement is simply to prevent either party from successfully alleging in any subsequent proceedings either estoppel or waiver by reason of anything done in the matter after the date of the agreement. I cannot read its terms as going beyond that point, and in particular I cannot read it as an authority given by the defendant to the plaintiff companies to settle the third party claims for and on behalf of the defendant, so that the defendant made himself liable to the plaintiffs in case he should be found guilty of a breach of the policy. It preserved whatever legal rights the plaintiff companies had

at that time but this did not include a right to enforce reimbursement against the defendant. The payments made by the plaintiff companies in settlement of the third party claims were primarily in discharge of their own statutory liability to third parties rather than payments on behalf of the defendant at his request express or implied.

In the result I can see no grounds on which the plaintiffs are entitled to reimbursement, and accordingly would allow the appeal with costs and dismiss the action with costs.

Appeal allowed with costs.

[COURT OF APPEAL.]

Noll et al. v. Toronto Transportation Commission.

Negligence—Motor vehicles—Highways—Obligation to stop before entering a “through” highway—Limits of highway—Misdirection by trial Judge—New trial—The Highway Traffic Act, R.S.O. 1937, ch. 288, sec. 39(3).

By sec. 39(3) of The Highway Traffic Act, R.S.O. 1937, ch. 288, “the operator or driver of every vehicle or street car, or the car of an electric railway shall immediately before entering or crossing a “through” highway bring the vehicle to a full stop”. This section does not refer to entering an intersection but imposes a duty on the operator to bring his vehicle to a stop before entering a “through” highway, and the limits of a highway are not the same as the limits of an intersection as defined in the Act.

Hence, a new trial was ordered where the trial Judge in a case involving a collision between a motor car and a street car instructed the jury that the operator of the street car should have brought the street car to a full stop before entering the intersection which he defined as commencing at the continuation of the curb of the through highway and where the limits of the through highway were not established by the evidence and were not readily discernible upon the ground and there were other circumstances upon which the jury had not passed.

AN appeal by the defendant from a judgment of Makins J. in favour of the plaintiffs at the trial of the action with a jury.

October 9th and 10th, 1941. The appeal was heard by ROBERTSON C.J.O., MASTEN and HENDERSON JJ.A.

I. S. Fairty, K.C., for the defendant, appellant.

R. R. McMurtry, for the plaintiffs, respondents.

October 17th, 1941. ROBERTSON C.J.O.:—This is an appeal from the judgment of Makins J., of the 20th June, 1941, at the trial of the action before him with a jury, at Toronto.

The action arises out of a collision between a motor-car, in which the respondents were riding and a street-car of the appellant, at the intersection of Howard Park Avenue with Parkside Drive. This is not the ordinary intersection of two streets at right-angles. Parkside Drive runs north and south; Howard Park Avenue at this point, coming westerly, runs a little to the south of west. A little to the east of Parkside Drive another street—High Park Gardens—coming more directly west, joins Howard Park Avenue and the paved roadways of the two streets run side by side into Parkside Drive, and for a short distance east of Parkside Drive there is considerably more than the ordinary distance between curbs. Then the corners on the east side of Parkside Drive where these two streets run into it are rounded and not angular. The result is that from the junction of Howard Park Avenue with High Park Gardens westerly into Parkside Drive there is a rather wide spread of pavement, and there is nothing plainly discernible to mark the east limit of Parkside Drive.

Parkside Drive from Lakeshore Road to Bloor Street West has been designated a "through" highway by proper authority, and sec. 39(3) of The Highway Traffic Act therefore applies to it. This subsection provides, "The operator or driver of every vehicle or street-car, or the car of an electric railway shall immediately before entering or crossing a "through" highway bring the vehicle to a full stop." There is a "stop sign" on the north side of Howard Park Avenue and another on the north side of High Park Gardens, in each case to the east of the junction of these two streets.

The easterly limit of Parkside Drive has not been located for the purposes of this case, but it is plain that both of these "stop signs" are located somewhat to the east of the easterly limit of Parkside Drive, but how far does not appear. On the north side of Howard Park Avenue a street-car stop for west-bound cars is also indicated, a short distance to the east of the "stop sign" on Howard Park Avenue.

Appellant's street-car, travelling westerly, collided with the motor-car of the respondents travelling north. The collision was at a point about the centre of Parkside Drive. Respondents say the street-car was proceeding across Parkside Drive without first having stopped, as the statute requires. The street-car conductor says that approaching Parkside Drive he had

stopped at the street-car stop on Howard Park Avenue somewhat to the east of Parkside Drive to discharge a passenger. He says that when he stopped the centre doors of the street-car were opposite the street-car "stop sign." That brought the front of the street-car to a point some eight or ten feet east of the "stop sign" for Parkside Drive. Having discharged his passenger, he says that he proceeded westerly at the rate of five or six miles an hour to Parkside Drive, and there being no traffic near, he continued across. He says that when he had got to about the centre line of the pavement on Parkside Drive he saw respondents' motor-car coming towards him from the south at high speed, that he stopped the street-car within a few feet, and immediately afterwards the motor-car crashed into the side of it.

The respondents and their witnesses tell an altogether different story. They say that the street-car was going at twenty or twenty-five miles per hour as it came into Parkside Drive, that they were travelling at a quite moderate speed near the curb on the east side of Parkside Drive, and applied their brakes and turned to the left in an effort to avoid the street-car, which, however, struck the motor-car after it had got to the centre of the pavement. One of respondents' witnesses, who lives near the street-car stop on Howard Park Avenue, says that the street-car did not stop even at that point, but proceeded through to Parkside Drive at a considerable speed.

The jury found the appellant guilty of negligence which "consisted of failure to stop immediately before entering intersection." They found that the respondent driver of the motor-car was not guilty of negligence.

It is argued for the appellant that the jury did not determine the essential issues between the parties, and that, read in connection with the charge of the trial Judge, their finding does not support the judgment for the respondents. We have not before us the address of respondents' counsel to the jury, and therefore cannot say just how he put his case. In the course of his charge, however, the learned trial Judge said, "Of course, the plaintiffs say that the whole cause of the accident was not any carelessness on their part, but solely caused by the failure of the street-car to observe the regulation and the law as laid down in The Highway Traffic Act, that they should stop immediately before entering a through highway." The respondents were entitled to put their case in that somewhat narrow

way if they chose, relying wholly upon the breach of the statute, and if there was nothing more said appellant could hardly be heard to complain. Trouble arises from the fact that the learned trial Judge further directed the jury that the place at which the statute requires the stop to be made is at the line of the curb that borders the roadway for vehicular traffic, instead of at the street line. While the jury was out, after the completion of the Judge's charge, the following occurred in the course of discussing some objection to the charge by counsel:

"His Lordship: I am afraid I would have to destroy any remark I could make that would help you there simply because I would have to tell the jury that the stop sign is not an indication you should stop at the spot where the stop sign is, it is only an indication that you shall stop before you enter the intersection, and the Act says immediately before entering the intersection.

Mr. Young: Where is the intersection?

His Lordship: The easterly curb of Parkside Drive.

Mr. Young: The prolongation of that curb?

His Lordship: Yes."

Later the jury was called back and the charge was supplemented on some points. In the course of his remarks the learned trial Judge said to the jury, "The stop sign is not for the purpose of telling you the exact spot to stop at. The Act says you shall stop immediately before entering the intersection. Now the intersection on that side commences at a continuation of the easterly curb of Parkside Drive, immediately before that."

It must be said that counsel for the appellant at the trial did not object to this interpretation of the statute as to the proper place to stop. The point he was really endeavouring to make was that Parkside Drive had not been effectively constituted a "through highway" when there was no "stop sign" at or within a proper distance of the place where a stop was to be made.

With great respect, the learned trial Judge was wrong, in my opinion, in telling the jury that the place at which the statute requires a stop to be made is at the line of the easterly curb on Parkside Drive. The stop is to be made immediately before entering the through highway. The easterly limit of Parkside Drive was not located for the purposes of this trial, but it is unquestionably somewhat more remote from the place of

the collision and nearer to the place where the street-car did stop than the line of the curb on the east side of the roadway. It is argued that it makes no difference that the wrong instruction was given the jury as to the place to stop, for the street-car did not stop at any place that can be considered as the place where the statute required it to stop. I venture to think, however, that that does not take into account all the facts of the case.

While the line of the curb is readily discernible to an approaching vehicle, and if that were the place to stop, the motor-man would have known definitely that it was his duty to stop there, and the driver of a vehicle on Parkside Drive would have a right to expect him to stop there, a materially different situation existed with respect to stopping at the street line. That is not readily discernible. None of the plans filed by either appellant or respondents, nor do the photographs put in, enable one to locate the street line with any certainty. To one operating a vehicle on Howard Park Avenue and approaching Parkside Drive from the east, there would be nothing on the ground to tell him where he should stop. In this situation a jury might quite reasonably have considered the conduct of the appellant's motor-man, and respondents' conduct as well, in a somewhat broader way, and with less particular regard to the statutory requirement to stop at the street line. If the jury accepted the evidence of the motor-man, as it was within their province to do, and had considered that having stopped once at the street-car stop he had then proceeded slowly into the intersection, and had further considered that the conduct of respondents was as the motor-man described it, they might well have found that the respondents were at least in some degree responsible for the collision. The jury did not in fact find one way or the other upon the very conflicting evidence, and it is out of the question that this Court should make any assumption as to the way in which the jury would have regarded it. The jury might still have found the motor-man responsible on the short ground that he had not obeyed the statute, but that again was for the jury.

The case went to the jury and was determined by them upon an erroneous view of the statutory requirement, and there must be a new trial.

As counsel for the appellant did not object to the manner in which the learned trial Judge interpreted the statute, I do not think the appellant should have the costs of the former trial, no matter what may be the result of a new trial. I would make the costs of the trial costs to the respondents in the cause. The appellant should have the costs of the appeal in any event of the cause.

HENDERSON J.A. agreed with ROBERTSON C.J.O.

MASTEN J.A.:—The facts have already been fully and very lucidly stated by my Lord the Chief Justice, and I agree with his statement of the facts. I am clearly of opinion that the charge of the trial Judge was erroneous in fact in regard to the application of The Highway Traffic Act, R.S.O. 1937, ch. 288, sec. 39, subsec. (3), first, because the stop is by the statute directed to be made before entering a “through highway” not through an intersection. Now “highway” in subsec. (3) means the whole highway, not the *via trita* plus the sidewalk. As we all know, pedestrians go lawfully anywhere on the highway, and frequently there are side paths used by them quite outside of the *via trita*. The boundaries of the highway are not the same as the boundaries of an intersection as defined in the Act. Secondly, the charge of the trial Judge failed to point out that the eastern boundary of Parkside Drive was not established by any evidence.

Nevertheless, I have felt, and still feel grave doubts as to whether the charge went so far as to instruct the jury that there was in fact a breach of the statute, and took away from them the right to determine whether the appellant’s driver had in fact committed a breach of the statute.

I also have felt doubts as to whether in view of the admitted fact that the only stop of the street-car was at least 10 feet east of the stop-sign, something like 70 feet from the highway, any miscarriage of justice could possibly arise from the mistaken observations of the trial Judge. These doubts are so far weakened by my respect for the strong opinions entertained by my colleagues that I fear I must be wrong, and do not record any formal dissent.

Appeal allowed.

[COURT OF APPEAL.]

Re Shaw.

Wills—Interpretation—Succession duties—Direction by testator that succession duties be a first charge on his estate—Whether duty on legacies to be paid out of residue.

The testator by his will directed all his "just debts, funeral and testamentary expenses, succession duties and other taxes to be a first charge on my estate, and to be paid and satisfied by my executors hereinafter named as soon as conveniently may be after my decease". *Held*, that the direction exonerated legatees from the payment of succession duty on benefits bequeathed to them and that such succession duty should be borne by the residuary estate.

A motion by the administrator with the will annexed of the estate of William Henry Shaw, deceased, for an order determining certain questions which had arisen in the administration of the estate.

The motion was heard by J. G. KELLY J. in Weekly Court at Toronto.

G. T. Walsh, K.C., for the administrator.

F. C. Forster, for Della M. S. H. Shaw, widow of the deceased.

A. L. Fleming, K.C., for residuary beneficiaries.

May 19th, 1941. J. G. KELLY J.:—This is an application by the administrator (with will annexed) of the estate of William Henry Shaw, deceased, for the determination of certain questions arising in the administration of the estate.

The paragraphs in the will of the deceased which give rise to the questions are the following:

"I direct all my just debts, funeral and testamentary expenses, succession duties and other taxes to be a first charge on my estate and to be paid and satisfied by my executors hereinafter named as soon as conveniently may be after my decease.

"I give, devise and bequeath all my real and personal estate in the manner hereinafter mentioned, that is to say . . .

"3. Subject to the conditions in this my Will contained, I direct that all my right, title, and interest in the business known as The Shaw Business Schools shall be transferred to my son W. Reg. Shaw subject to a secured agreement on his part to pay to my wife the sum of \$2,400.00 annually in sums of \$100.00 on the 1st and 15th of each and every month, as long as she may live and remains my widow . . .

"5. Subject to the conditions in this Will contained, I direct that the shares in the Capital Stock of Shaw Schools, Limited,

now recorded in my name, shall be transferred to my son W. Reg. Shaw subject to an agreement made by the company and endorsed personally by him to pay to my widow the sum of \$1,200.00 annually from the receipts of this corporation, in equal payments on the 1st and 15th days of each month as long as she shall remain my widow."

The questions asked by the administrator resolve themselves into two main questions, in substance as follows:

(1) Has the clause in the will first quoted above the effect of freeing all gifts and benefits (other than residuary gifts) given by the will from succession duty so that these duties will be paid in reduction of the general residue, or is there to be deducted from each gift the succession duty levied in respect thereof?

(2) Does the widow receive benefits from the will under clauses 3 and 5 quoted above, or are the payments made to her pursuant to those clauses made by an agreement outside the will so that she in fact receives nothing from her husband's estate by virtue of these clauses?

I deal with the second question first.

It seems to me that the widow clearly receives benefits from the estate of her husband under clauses 3 and 5 of the will. If the son should refuse to make the payments or enter into the agreements called for by these clauses it is not to be supposed that the widow would then be without any right to the annuities given or directed to be given by these clauses. The interest of the administrator in the specific assets dealt with in these clauses is I think charged with the payment in any event to the widow of the sums therein specified. See *In re Kirk* (1882), 21 Ch. D. 431; *Re Cleghorn* (1919), 45 O.L.R. 540.

The first question is an important one and depends upon construction of the language used by the testator. I had to deal with a somewhat similar question in *Re Reading*, [1940] O.W.N. 9.

Although The Succession Duty Act, 1939, 3 Geo. VI, ch. 1, has been amended, the amendments do not affect the law applicable here. By sec. 10 each legatee is liable for the duty upon so much of the deceased's property as passes to him and is dutiable. Section 24 requires an executor before paying money or handing over property to a legatee, to deduct therefrom any duty payable thereon, makes the executor accountable to the Crown for money

so collected or in his hands, and imposes penalties upon the executor personally for failure to collect the duty and to pay it over to the Treasurer of Ontario.

The question, therefore, is this: When the testator directed his executors to pay all his just debts, funeral and testamentary expenses, succession duties and other taxes, and that these should be a first charge on his estate, did he impose duties upon the executors which had not already been imposed upon them by law, and did he indicate a clear intention that, in addition to the gifts specified in the will in each case, he was making an additional gift of the succession duty payable in respect thereof?

I have considered the matter as carefully as I can, and in my opinion there is not sufficient in the will to justify any different treatment of the succession duties than would be given had succession duties not been mentioned. The direction to the executors to pay the duties seems to be no more than a direction to do what the law requires executors to do in every case just as the direction to pay debts, funeral and testamentary expenses, is in law an unnecessary direction.

The words making the succession duties a first charge on the estate present some difficulty; but, in a very real sense, under the provisions of The Succession Duty Act to which I have referred, these duties are in any event a first charge on the estate; they must be paid by the executor, or, at any rate, provision must be made by him for their payment before any gift may be handed over to the beneficiary entitled. That is to say, it is not clear, in my opinion, that the testator in the clause referred to was doing more than setting out the duties which ordinarily must devolve upon his executor before he proceeds to distribute the estate to those beneficially entitled.

In view of the wording of the Succession Duty Act making it the clear duty of the administrator to pay succession duty before distributing, I cannot find any sufficient evidence of an intention on the part of the testator to alter the normal method of administration or to make an additional gift of the succession duty.

The reasoning in *Kennedy et al. v. Protestant Orphans' Home, et al.* (1894), 25 O.R. 235, and in *Re Bolster* (1905), 10 O.L.R. 591, in our own Court is, I think, in point, and should be adopted. See also *Re Borough*, [1938] 1 All E.R. 375, and *Re Sanger*, [1938] 4 All E.R. 417.

The questions therefore must be answered as follows:

The sums received by the widow pursuant to clauses 3 and 5 of the will are benefits passing to her under the will, and the executors must deduct from the benefits going to any person under the will the succession duty payable in respect of such benefit. The costs of all parties appearing upon this application should be paid out of the estate, those of the administrator as between solicitor and client.

Della M. S. H. Shaw appealed to the Court of Appeal from the order of J. G. Kelly J.

The appeal was heard by RIDDELL, FISHER and GILLANDERS JJ.A.

W. Lawr, K.C., and *F. C. Forster*, for Della M. S. H. Shaw, appellant.

A. L. Fleming, K.C., for the residuary beneficiaries, respondents.

G. T. Walsh, K.C., for the administrator.

December 4th, 1941. RIDDELL J.A.:—This is an appeal from a judgment of Mr. Justice Kelly. It was fully and ably argued by counsel for all concerned, but the question of law to be decided by us is very simple, though very important.

By his will, the late William Henry Shaw made the initiatory provision:

"I direct all my just debts, funeral and testamentary expenses, succession duties, and other taxes to be a first charge on my estate, and to be paid and satisfied by my executors hereinafter named, as soon as conveniently may be after my decease."

The question to be decided is whether this provision took the legacies out of the statutory direction of R.S.O. 1937, ch. 26, sec. 19, rendering a beneficiary liable for the tax properly applicable to the benefit obtained. The learned trial Judge held in a very carefully written judgment that it did not.

I find myself unable to understand how a direction to pay a legacy, etc., in priority to all else does not make such a legacy exempt from a burden imposed upon it by a statute.

I would allow the appeal with costs here and below.

FISHER J.A.:—This appeal is taken by the widow of the deceased from the judgment of Kelly J., on an application under the Trustee Act and Consolidated Rule 600 for advice and

direction, and the neat and sole question for determination is, are the succession duties in respect of the benefits received by the widow to be borne by and charged to her interest in the estate or to that of the residuary legatees?

The learned Judge found that the benefits from the estate received by the widow were subject to succession duties, surtax, and interest, and were to be borne by and charged to her.

The paragraph in the will which has given rise to the question involved in this appeal reads:

"I direct all my just debts funeral and testamentary expenses, succession duties and other taxes to be a first charge on my estate and to be paid and satisfied by my executors hereinafter named as soon as conveniently may be after my decease."

It is admitted that the testator left an estate of sufficient value to not only pay all his debts, including succession duties, but sufficient to pay and discharge the bequests and gifts mentioned in the will.

In view of the provisions of the Succession Duty Act, is this clause in the will sufficiently clear and was it the testator's intention to exonerate the widow (the appellant) from payment of succession duty on the benefits bequeathed to her? The learned trial Judge found that the clause in question did not do so. With great respect I am of opinion that it did. The Court must be concerned with the meaning of the words in the clause and the intention of the testator; and the question here is, what was the testator's intention, and why did he, before disposing of any of his property to the beneficiaries named in his will, charge his estate and direct his executors to pay all debts and succession duties? These words must mean something and cannot be ignored unless the time has arrived when a testator in this Province is not free to exercise his inherent legal right to dispose of his property as he desires so long as he does not interfere with or run counter to the provisions of the Succession Duty Act. I cannot find any interference with the Act in the case at bar.

It is argued on behalf of the respondents that, notwithstanding the plain meaning of this clause, the executors must nevertheless comply with the Act, and deduct whatever amount is due for duty on the benefits given to the widow. If that argument is sound, it means that no matter what the testator stated in

his will, or what his intention was, and no matter if he did leave sufficient estate to pay all his debts, succession duties and including the benefits bequeathed, he is helpless to exonerate in this case the benefit given to the widow from payment of succession duty, and further it was argued that in order to relieve a beneficiary of the statutory duty to pay succession duties, provision must be found in the will of a clear gift of the duty out of the estate.

It is, of course, clear, as pointed out by Kelly J. that the Succession Duty Act, R.S.O. 1937, ch. 26, sec. 19(1) imposes on a person taking property under a will, a liability to pay succession duties; that under sec. 23(1) a lien exists on any such property, and that by sec. 25(1) no transfer of property by executors can take place without first deducting the duty. But my difficulty is in understanding what relevancy these sections of the Act have when a testator leaves an estate sufficiently ample to pay all his debts and succession duties independent of what was given by him to the beneficiaries, and by his will exonerated his beneficiaries from payment of succession duty. If there must be a clear gift out of the estate to relieve a beneficiary of a statutory duty to pay succession duty, is that not in effect what this testator did. He was giving certain benefits to his wife, and instead of his widow being obligated to pay succession duty thereon, he charged, as he had a right to, his estate with payment of them, and that, to my mind, was a clear gift to her out of the estate of whatever succession duty she would have been called upon to pay.

Here the testator has directed that before the devises and bequests under his will are to be appropriated, the executors are to make provision out of the whole estate for (*inter alia*) succession duties. It is only after that that the devises and bequests are to be appropriated. The effect of this must be to appropriate first out of the estate the various amounts required to pay the succession duty on the devises and bequests. It is only after that is done that the estate is to be apportioned under the will. This, to my mind, clearly indicates an intention to make an additional gift to the beneficiaries of the succession duty for which they are as between themselves and the government primarily liable.

It may be, as stated by the learned Judge, that a direction in a will to pay debts and succession duties is unnecessary, as

they are primarily chargeable against the estate, but surely that does not debar a testator from providing in his will that in the administration and disposal of his estate any debts or succession duties shall be a first charge, and that the executors shall satisfy them before any distribution is to take place. It may be an unnecessary direction, but it is important in determining what the testator's intentions were. If that provision in the will is clear I know of no statutory law that deprives or prohibits a testator in this Province from exonerating his beneficiaries from the payment of succession duties if he leaves an estate of sufficient value to pay all his debts and duties independent of what is given to his beneficiary.

In a very recent case in *Re Johnston Estate*, [1941] 2 W.W.R. 94, a clause in that will directed that all the testator's debts, funeral and testamentary expenses and succession duties were to be paid by his executors. It will be observed that that clause is not as strong as the clause in the case at bar, wherein the testator made the debts and succession duties "a first charge" on his estate. Adamson J. in construing the clause was of the opinion that the specific legacies were exonerated from payment of succession duties. In his reasons he expressed his views, and I fully agree with them, in the following language:

"It is all very well for Courts and Judges to refine about these matters, but we know very well that when a testator directs that his succession duties be paid out of the general body of his estate, he ordinarily intends the specific gifts and bequests will be free from the duty. And where a fund is set up and directions given as here, it seems clear. It is true that the conveyancer might have and perhaps should have been clearer, but to the ordinary lay person this would be clear. In my view there is not the slightest doubt that, when the testatrix said to pay succession duties and legacies, she never intended that the residue of the estate should recoup itself from each of the bequests for their *pro rata* share of the succession duties."

I am of opinion that upon the true construction of this particular clause in the will that the testator exonerated the appellant from payment of succession duty on the benefits bequeathed to her, and it should be declared that the executors are not called upon to deduct succession duty from the bequest given to the appellant, but that it should be deducted from the estate.

I would allow the appeal with costs.

GILLANDERS J.A.:—I have had the privilege of reading the judgment of Mr. Justice Fisher and am in agreement with his opinion that upon a true construction of the will the testator exonerated the appellant from payments of succession duties that might be levied on benefits passing to her.

The question for decision is one on which there may well be some difference of opinion. Apart from the provisions of the will succession duties are not by Statute made a charge on the whole estate. The Succession Duty Act, 1939, 3 Geo. VI, ch. 1, and amendments, makes the duty a first lien or charge on property passing on which duty is levied. Some benefits passing may not be taxable. Others may be taxable at different rates. The duty in each case is a charge on particular property on which it is levied. To make succession duty a first charge on an estate to my mind implies something more and has the effect of reducing the general residue.

The will here provides for the disposition of "the residue of my estate remaining after providing for the payment of said legacies and other necessary and proper disbursements." The testator had previously directed his just debts, funeral and testamentary expenses, succession duties and other taxes to be a first charge on his estate and to be paid by his executors. I am inclined to the view that the testator has made it sufficiently clear that he intended the necessary and proper disbursements to include the items he had specifically charged on his estate and specifically directed his executors to pay.

Respecting the question as whether or not the widow receives benefits under clauses 3 and 5 of the will, it was ably argued by counsel for the appellant that no property passed on the death of the testator to his widow within the meaning of sec. 5 of the Succession Duty Act, but that the property in question passed to the son, W. Reg Shaw, and was taxable as so passing, and that the widow's benefits are paid by the son under an agreement and are not paid by the executors from the assets of the estate. On this question I am in agreement with the conclusion of the learned trial Judge. By clauses 3 and 5 of his will the testator manifestly intended to make provision for his widow as well as his son.

Appeal allowed with costs.

[COURT OF APPEAL.]

Inglis v. The Great West Life Assurance Co.

Contracts—Insurance agents—Commissions—Renewal premiums—Restraint of trade—Penalties.

An agreement between a life insurance company and an agent of the company contained the following clause: "Either party may at any time with or without cause terminate this agreement by giving notice . . . provided that if this agreement shall be terminated after having remained in force for not less than three full years and if the agent shall have fully complied with all the terms hereof, the company shall continue to pay to the agent (during a period equal to that for which this agreement may have been in force) the commissions on business written during the continuance of this agreement to which the agent would have been entitled if this agreement had remained in force. Should the agent become connected with or do business directly or indirectly for any other life insurance company after the termination of this agreement he shall forfeit and hereby specially waives any claim to commissions under this paragraph".

Held, that the last sentence of the above quoted clause of the agreement is not in the nature of a penalty from which the agent is entitled to be relieved as inequitable nor is it void as being in restraint of trade. If the agent chose to join another life insurance company his right to payment of commissions would cease in pursuance of the agreement by which the agent voluntarily bound himself in the beginning.

AN action on a contract between a life insurance company and an agent of the company.

The action was tried by GREENE J. without a jury at Toronto.

H. Freshman, for the plaintiff.

J. R. Cartwright, K.C., for the defendant.

August 20th, 1941. GREENE J.:—The action arises out of a written contract made between the parties hereto in March, 1927, whereby the defendant appointed the plaintiff its agent to solicit insurance in the City of Windsor and the surrounding district. The agreement was terminated by the defendant in November, 1935, and the defendant company continued to credit the plaintiff's account with commissions on renewal premiums of policies obtained by him until June, 1936, when the plaintiff became connected with another life insurance company.

The plaintiff sues for (a) damages for wrongful dismissal, (b) payment to him to date of all commissions on renewal business, and (c) a declaration that he is entitled to commissions on such renewal business in the future. In November, 1935, when the contract was terminated by the defendant, the plaintiff was indebted to the defendant for advances made, and the commissions on renewal business between then and June, 1936,

were credited to the plaintiff's account, leaving a balance standing against him in the books of the defendant company of \$1,441.26. The defendant counterclaims for this amount.

The action really turns upon the effect of the following clauses in the contract:

"4. Renewal Commissions. If the Agent shall produce in any contract year personal paid for business of \$50,000 or over, the company shall pay him during the continuance of this contract, renewal commissions as follows on the premiums received on such business:

."

"17. Either party may at any time with or without cause terminate this agreement by giving notice to that effect, the company to be addressed to its Head Office at Winnipeg, Manitoba, or the Agent to Windsor, Ont., provided that if this agreement shall be terminated after having remained in force for not less than three full years and if the Agent shall have fully complied with all the terms hereof, the Company shall continue to pay to the Agent, (during a period equal to that for which this Agreement may have been in force) the commissions on business written during the continuance of this agreement to which the Agent would have been entitled if this agreement had remained in force. Should the Agent become connected with or do business directly or indirectly for any other life insurance company after the termination of this agreement he shall forfeit and hereby specially waives any claim to commissions under this paragraph. Any commissions which after the termination of this agreement the Company shall continue to pay in accordance with the terms of clause 17 hereof shall be reduced by a collection fee of 1% of the premiums on which such commissions are to be paid."

The plaintiff did become entitled to renewal commissions as provided for in clause 4.

As regards the claim for wrongful dismissal, the words of clause 17 are perfectly clear. The agreement may be terminated by either party at any time with or without cause. It is quite irrelevant as to whether there existed good ground for the termination or not.

The plaintiff's main claim is for relief against forfeiture of renewal commissions after he became connected with another

life insurance company as being in the nature of a penalty and inequitable.

In clause 4 it is distinctly laid down that renewal commissions are only payable during the continuance of the contract. If the contract contained no other term as to renewal commissions it would be exactly the same in effect, though with slightly different wording, as a contract considered by the Supreme Court of Canada in *Confederation Life Association and Berry*, [1927] S.C.R. 595. There Anglin C.J., in delivering the judgment of the Court, said, at p. 597:

"There is nothing ambiguous in this contract. Its plain terms must be given effect to regardless of any consideration of harshness or unfairness or of supposed intentions of the parties other than those expressed therein."

The provisions for remuneration however did not stop with clause 4. Clause 17 provides further benefits for the agent in regard to renewal commissions, if the contract remained in force for three years or more, and the agent during such period complied with all the terms thereof. The contract did remain in force for approximately eight years before being terminated by the company, and there is no suggestion by the defendant that during such period the plaintiff did not comply with the terms of the contract.

The case narrows down to a consideration of the validity of the provision contained in the words in clause 17:

"Should the Agent become connected with or do business, directly or indirectly for any other life insurance company after the termination of this agreement he shall forfeit and hereby specially waives any claims to commissions under this paragraph."

The Judicature Act, R.S.O. 1937, ch. 100, sec. 18, provides that:

"The Court shall have power to relieve against all penalties and forfeitures"

The plaintiff claims relief under that power and also on the ground that the clause is void as being in restraint of trade.

The plaintiff's attack is the same under both headings, namely, that whether viewed as a penalty clause or a contract in restraint of trade, there being no restrictions as to time or place, the clause cannot stand. Certainly the provision could not be framed in wider terms. It is not limited to selling insurance or

to any portion of the world. It could be argued with great force that the wording of the clause would apply if the plaintiff took a position as watchman of a vacant building in a wilderness for another insurance company. As a matter of fact while it does not affect the principle involved, the plaintiff took a position as agent for another company in the City of London, where it is extremely unlikely that connections made by him in Windsor could be used by him to the disadvantage of his previous employers.

Mr. Cartwright's argument as always is logical and entitled to respect. He points out that paragraph 4 contains a contract exactly similar in terms to that upheld by the Supreme Court of Canada in *Confederation Life and Berry* (*supra*) and that it cannot be disputed that paragraph 17 as a whole acts in amelioration of the harsh terms of paragraph 4. If it was the function of the Court to review the fairness of the consideration on each side of a contract, then in view of the decision in *Confederation and Berry*, Mr. Cartwright's contention would have to prevail. It is hardly necessary to state that such is not the function of a Court. In this case the insurance company promised certain remuneration to the agent for certain work. The work had been done and the agent was entitled to remuneration on the terms set out. The question, is, was the company entitled to deprive the agent of part of his remuneration under the terms of the proviso under discussion.

In my opinion the clause, whether viewed as a penalty or as a contract in restraint of trade, is void because it contains absolutely no limitation as to time, place, or nature of the connection with another insurance company.

There will be judgment in favour of the plaintiff, with costs, declaring that he is entitled to receive all renewal commissions falling to him under the contract irrespective of the forfeiture clause.

It is my understanding that commissions since June 3rd, 1936 (when the defendant ceased crediting the plaintiff with commissions) will more than take care of the counterclaim but if such is not the case, then the defendant will be entitled to judgment for the balance of its counterclaim but without costs.

The defendant appealed to the Court of Appeal from the judgment of Greene J.

December 3rd, 1941. The appeal was heard by ROBERTSON C.J.O., MASTEN and FISHER JJ.A.

J. R. Cartwright, K.C., for the defendant, appellant.

H. Freshman, for the plaintiff, respondent.

December 12th, 1941. The judgment of the Court was delivered by MASTEN J.A.:—This is an appeal by the defendant from a judgment of Greene J., dated the 20th August, 1941, whereby it was declared that the plaintiff is entitled to payment to himself of renewal commissions irrespective of the forfeiture clause contained in his contract with the defendant company, and whereby a reference was directed to the Master to take an account of the moneys so payable, and for payment of the amounts so found due; and whereby it was further ordered that the defendant recover against the plaintiff on its counterclaim such amount, if any, as remained due to the defendant after crediting all commissions due to the plaintiff.

On the hearing of the appeal all the various claims put forward by the plaintiff in the statement of claim were abandoned save one, namely, the prayers numbered 6(a) and (b) in the statement of claim, which read as follows:

“6. The plaintiff therefore claims:

(a) payment to himself of all commissions to which he is entitled as of this date in such sum as this Honourable Court may decide.

(b) a declaration that he is entitled to renewal commissions in the future.”

The counterclaim of the plaintiff for which judgment was granted at the trial was not contested either as to its validity or as to the amount claimed, namely, \$1,441.26, and the sole question discussed before the Court relates to the construction and the effect in equity of paragraph 17 of the agreement between the plaintiff and the defendant (Exhibit 1) at the trial. That clause reads as follows:

“17. Either party may at any time with or without cause terminate this agreement by giving notice to that effect, the Company to be addressed to its Head Office at Winnipeg, Manitoba, or the Agent to Windsor, Ont., provided that if this agreement shall be terminated after having remained in force for not less than three full years and if the Agent shall have fully complied with all the terms hereof, the Company shall con-

tinue to pay to the Agent, (during a period equal to that for which this agreement may have been in force) the commissions on business written during the continuance of this agreement to which the Agent would have been entitled if this agreement had remained in force. Should the Agent become connected with or do business directly or indirectly for any other life insurance company after the termination of this agreement he shall forfeit and hereby specially waives any claim to commissions under this paragraph. Any commissions which after the termination of this agreement the Company shall continue to pay in accordance with the terms of clause 17 hereof shall be reduced by a collection fee of 1% of the premiums on which such commissions are to be paid."

The crucial provision of clause 17 on which the argument turns, is as follows: "Should the Agent become connected with or do business directly or indirectly for any other life insurance company after the termination of this agreement he shall forfeit and hereby specially waives any claim to commissions under this paragraph."

The plaintiff acted as an agent of the defendant company for some nine years and became entitled as compensation in full of his services to certain commissions on first year premiums, and to commission on renewal premiums paid during the continuance of the agreement on business secured by him, and, subsequently at the end of the nine years, the defendant company exercised its right to terminate the agreement by giving notice to that effect to the plaintiff. Thereafter, under the provisions of clause 17 commissions on renewal business were duly paid to the plaintiff up to the time when he became connected with and did business for the Monarch Life Insurance Company.

The learned trial Judge in his reasons for judgment gave effect to the contention of the plaintiff that the forfeiture of renewal commissions after the plaintiff became connected with another life insurance company was in the nature of a penalty from which he was entitled to be relieved as inequitable. He also held the provision void as being in restraint of trade.

A clause similar to clause 17 is said by counsel to be a customary clause in agreements by insurance companies with their agents, and its proper construction is a matter of very wide and

general importance. On this ground, and also out of respect and courtesy to the very learned trial Judge whose judgment is in question and from whom we are differing, it has been thought desirable that the reasons of the Court should be stated in writing.

We are of the opinion that the provisions of clause 17 are not in the nature of a penalty. Whether it is to be considered as part of the remuneration provided by the agreement when read as a whole, or as a separate provision entered into in consideration of the right of either party to cancel on notice, appears to the Court to be immaterial. In either case it is the agreement of the parties, not a penalty. The plaintiff agreed that if he chose to join another life insurance company these payments would cease. He did so choose, and their cessation is not in the nature of a penalty but is in pursuance of the agreement by which the plaintiff voluntarily bound himself in the beginning.

The Court is also agreed that clause 17 is not in restraint of trade. The plaintiff was not thereby precluded from himself cancelling the agreement or from going anywhere and doing anything he chose to do, and there was no restraint of any kind on his activities. He voluntarily joined the staff of the Monarch Life Company with the agreement before him and with its provision definitely there stated, and he is bound by his own agreement.

On the argument before us counsel for the respondent argued that the defendant had waived compliance with the penalty provisions by taking active steps to assure his association with another insurance company. As already pointed out, we are all of opinion that the provision of clause 17 is not in the nature of a penalty provision. But even if it were, we can find nowhere in the evidence anything to indicate waiver by the defendant of the provisions of clause 17, nor any ground for the interference by way of equitable jurisdiction referred to by counsel for the plaintiff.

The view above expressed is in accordance with and supported by numerous American decisions, several of which were referred to by counsel for the appellant in his memorandum, and I quote only from the case of *McPherrin v. The Sun Life Assurance Co. of Canada* (1934), 257 N.W.R. 316, where a similar agreement was under consideration with respect to

the right to commission on renewals after the agent had entered the employment of another insurance company. At page 317 it is said:

"It is next urged that paragraph 18 of the contract was void because it imposed a penalty. This contention is based on the assumption that the plaintiff had acquired a vested right in the renewal commissions, and that they had already been earned by him at the time the contract was terminated. But the only right the plaintiff had to these renewal commissions was such as he might acquire by compliance with the contract."

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"It therefore seems perfectly clear from these provisions alone that the so-called forfeiture clause states but a contingency attached to, or a limitation upon, plaintiff's right to renewal commissions, and that it is not, therefore, a provision for forfeiture of a vested right therein, which view is but strengthened by many other provisions in the contract, and by the contract considered as a whole, as well as by the cases from this and other courts on the subject."

While the views so stated are in no way binding on this Court, yet they commend themselves to us and receive our entire concurrence.

For these reasons this Court is unable to concur in the result directed by the trial Judge, and allowed the defendant's appeal with respect to commissions and awarded judgment to the defendant against the plaintiff for the full amount claimed in its counterclaim with costs here and below.

Appeal allowed with costs.

[COURT OF APPEAL.]

Re Morrison.

Wills—Revocation—Mutilation—Will kept in possession of testator during his lifetime found after his death at his residence torn and mutilated—Presumption that will was torn by testator with the intention of revoking it.

Where a will has been last seen prior to the death of the testator in his possession or custody and when found after his death it has been destroyed by tearing, the presumption, in default of explanation, is that the testator himself destroyed the will with the intention of revoking it. Hence in the present case where there was no credible evidence to rebut the presumption it was held that the will had been revoked by the testator: *Colvin v. Fraser* (1829), 2 Hagg. Ecc. 325; *Allen v. Morrison*, [1900] A.C. 604; *Re Perry* (1924), 56 O.L.R. 278, applied.

AN appeal by William G. Schoonover, a son of the testator William H. Morrison, deceased, from a judgment of His Honour Judge Shea, of the Surrogate Court of the County of York, declaring that the paper writing filed in Court bearing date January 30th, 1939, and signed by William H. Morrison is the true last will and testament of the said deceased.

October 23rd, 1941. The appeal was heard by ROBERTSON C.J.O., MASTEN and HENDERSON JJ.A.

R. L. Kellock, K.C., and *J. D. Arnup*, for W. G. Schoonover, appellant.

J. P. Manley, K.C., for Guaranty Trust Co. of Canada.

R. M. W. Chitty, K.C., for Grace Irene Morrison, respondent.

J. M. Baird, K.C., for the Official Guardian for infant children of the deceased.

December 15th, 1941. ROBERTSON C.J.O.:—An appeal from the judgment of Judge Shea dated 22nd May, 1941, after the trial before him without a jury, of certain issues ordered to be tried in a matter pending in the Surrogate Court of the County of York.

The deceased, William Morrison, domiciled at Toronto, died on the 21st January, 1940, at Wilmington, in the State of North Carolina. On the 20th February, 1940, probate was granted by the Surrogate Court of the County of York to National Trust Company Limited of a will of the deceased dated 3rd September, 1930. In January, 1941, an application was made by Guaranty Trust Co. of Canada to revoke this probate and to admit to probate the alleged last will of the deceased bearing date 30th January, 1939. The appellant, a son of the deceased by his

first marriage, filed notice that he contested the validity of the alleged will propounded by the Guaranty Trust Co. of Canada, on the grounds "that it was not duly executed; that it was not executed by the testator; that in any event, if made or executed, it was revoked; and that its execution was procured by fraud and undue influence." Thereupon an order was made for the trial before a Judge of the Surrogate Court of the County of York of the following issues:

"(a) That the Guaranty Trust Company of Canada, Grace Irene Morrison, Zelda D. Morrison and Grace A. Morrison, affirm and William G. Schoonover denies, (National Trust Company Limited submitting its rights to the Court) that the said alleged will of January 30th, 1939, was duly executed by the said William Herbert Morrison, deceased, and should be admitted to probate.

"(b) That William G. Schoonover alleges that if the said alleged will was made or executed by the testator, the execution was by fraud or undue influence, and in any event the said alleged will, if made, was revoked; and Guaranty Trust Company of Canada, Grace Irene Morrison, Zelda D. Morrison and Grace A. Morrison deny that the execution of the alleged will was procured by fraud or undue influence or that the alleged will was revoked."

Later in the proceedings appellant gave notice that he wholly abandoned his claim or allegation that if the alleged last will and testament of the deceased dated 30th January, 1939, was made or executed by him, its execution was procured by fraud or undue influence.

The issues were tried before Judge Shea, and by his judgment—now in appeal—he declared the paper writing filed, and bearing date 30th January, 1939, to be the true last will and testament of the deceased. He ordered that the letters probate granted to the National Trust Company Limited of the will of the 3rd September, 1930, be revoked, and that letters probate issue to Guaranty Trust Co. of Canada of the will dated 30th January, 1939.

At the trial Edward Harris, one of the witnesses to the will of 30th January, 1939, testified to its due execution, and his credibility is not questioned. The second witness to the will is dead. By this will the testator revoked all former wills. There is no question, therefore, that the letters probate granted to the

National Trust Company Limited of the will of 3rd September, 1930, should be revoked. The whole question on this appeal is whether or not the testator revoked the will of 30th January, 1939.

As propounded, the will of 30th January, 1939, is torn into five pieces. The will is on a printed will form composed of a double sheet, and was filled in on a typewriter. This double sheet is torn from top to bottom down the centre into two sheets, and both sheets are torn completely across, some four or five inches from the top. There was some discussion on the argument of the appeal as to whether or not this tearing, if it should be found that it was done by the testator, was a sufficient act of revocation, and warranted the presumption of an intention to revoke. The learned trial Judge concluded that the testator did not tear the will, but that it was done by some unknown person who, he thinks, had it in his possession after the testator's death. He apparently doubted whether the tearing of the will, if it had been the act of the testator, was of a character that would amount to revocation within sec. 22 of The Wills Act (R.S.O. 1937, c. 164).

In my opinion, if the present torn condition of the will is the result of the act of the testator, he did enough tearing to revoke it, and presumably he did it with the intention to revoke it. No doubt it is still quite possible to put the pieces together and to read all that the will contained, but as a document it was destroyed. I find nothing in the statute that requires that to revoke a will by tearing, it must be reduced to such a condition that no one can afterwards put the parts together again and read it. This is not a case where it is said that the tearing was accidental or was done under mistake or for the purpose of cutting out some particular part of the will, as in some of the reported cases, where the will was held not to have been revoked or to have been revoked only in part. These sheets have been violently torn across without regard to any line, but making a ragged edge. This tear runs through the provisions of the will on the three pages of the document which contain them, and is not made with regard to any clause or to the special contents of any of the pages. No question is raised as to the testator's sanity, so that full intention can be ascribed to the act of tearing, if it was his. There was a good vigorous tearing up of the document, such as one makes when one is through with a

document. I cannot conceive that a sane testator would have so torn it except to revoke it. Neither do I think there is any place here for the suggestion of the learned trial Judge that if the testator had intended to revoke the will he would not have torn it as it is torn and then have retained all the pieces. There is no evidence that the testator retained the pieces. If the testator did tear the will we know nothing of the circumstances, nor of what followed the tearing of the will. Reference may be made to *Hobbs v. Knight* (1838), 1 Curt. 768; *Elms v. Elms* (1858), 1 Sw. & Tr. 155; *In the Goods of Morton* (1887), 12 P.D. 141.

The alleged last will as propounded was smudged and discoloured in places. The widow of the testator, from whom the Guaranty Trust Company received it, says there was blood on the document when it came into her hands, and that its present appearance is due to that and to her efforts to wash it off. The facts of this case are so unusual and the tales told by this woman are so contradictory, and her character as a witness is so discredited that it is impossible to determine with any assurance to what its present untidy appearance is attributable. The testator was shot in his own house near Wilmington by some one, and the widow says that he had the will there a few hours before he was shot, but I think nothing more can be based upon the appearance of the paper than to say that it adds to the suspicion that attaches to the circumstances of this case as a whole.

Having concluded, therefore, that the tearing of the will was a sufficient act of revocation within sec. 22 of The Wills Act, if it was the testator's act, and that in the circumstances of this case an intention to revoke should, in that event, be presumed or may be inferred from his act, it is necessary to consider the evidence to determine whether, upon the facts that are proved, or upon the presumptions that ought to be made, revocation is established.

It is not questioned by either side, but rather it is contended by both, that the will was in the possession or control of the testator until his death, or in any event until he was taken to the hospital where he died a few hours after he was shot. Appellant adduced no evidence upon that matter, but relies upon the evidence of Harris, the witness to the execution of the will, that upon its execution at Toronto the testator put the will in his pocket, and appellant says that in default of other credible evidence as to its possession, it should be presumed that the

testator retained possession or control of the will until his death. The widow, Mrs. Morrison, says that early in January, 1940, while on the way from his house in Toronto to the railway station to take a train for Wilmington, North Carolina, the testator called at his bank to get his will from his safety deposit-box; that when he came out he brought the will with him and showed it to her; that she saw it again in his drawer in a dresser at their house near Wilmington, and that only a few hours before he was shot she saw him take it from this drawer and put it with other papers in a despatch-box or small suit-case. According to the record kept by the bank, which was produced, the testator did not visit his deposit-box at the bank at the time stated, nor in fact at any time since a date prior to the making of the will of 30th January, 1939. Mrs. Morrison is not a credible witness in any event, but the will of 30th January, 1939, was produced by her to the Guaranty Trust Company in its present condition, and if her account of the possession of the will by the testator is not accepted respondents have given no other evidence of its possession prior to his death.

The question most in controversy at the trial was whether the will was torn while in the testator's possession or afterwards. The trial Judge decided that the will was torn after it had ceased to be in the testator's possession and before it came into the possession of his widow, who, in turn, delivered it to the executor, The Guaranty Trust Company. This finding is in conflict with the testimony of the widow, who was the only witness who claimed to have knowledge of the matter. Her evidence was that the will was still intact when it came into her possession some ten months after the testator's death, and that she herself tore it. The trial Judge did not believe this evidence, although he accepted the widow's account of her obtaining possession of the will, and his finding that some person, not the testator, nor the widow, but some unknown person, tore the will, is not supported by any direct evidence. Moreover, the presumption is against mutilation or destruction of a will by some one who had no right to mutilate or destroy it: *Allan v. Morrison*, [1900] A.C. 604; *Colvin v. Fraser* (1829), 2 Hagg. Ecc. 266.

Much depends in the deciding of this case upon the credit given to Mrs. Grace Irene Morrison, the testator's widow. The trial Judge, who had the advantage of seeing and hearing her give her evidence, said of her:

"I must say that in general I do not accept the evidence given by Mrs. Morrison. Her attitude in the witness-box, her manner of answering questions, the contradictions and variations in her testimony, convince me that she is quite regardless as to whether she is telling the truth or not. She answers very quickly and apparently without much thought. She does not appear to have a very clear appreciation of the distinction between truth and falsehood. I accept her evidence only where it is corroborated by other evidence, or where the circumstances or strong probability render it credible."

The will of 30th January, 1939, now in question, confers substantial benefits upon Mrs. Morrison. In this respect it is in contrast with the earlier will of September, 1930, under which she took nothing. Her two children are also more generously provided for under the later will, while the testator's son by his first marriage does not fare so well. Mrs. Morrison has, therefore, an interest in supporting the later will.

The testator married his second wife about twenty years before his death. They were married in Florida. Her home had been in North Carolina and her people lived there. Morrison was more than twenty years her senior, and, as has been already stated, he had been married before and there had been a divorce. Mrs. Morrison asserts that she did not learn of the former marriage and of the divorce until after her own marriage to Morrison, and that this made trouble between them and they separated for a time. She seems also to have deplored the existence of the appellant, Morrison's son by his first marriage, from the time she learned of it. Appellant lives in New York, where he is in business, and has a home and family of his own. He was brought up by his stepfather, a Dr. Schoonover, by whom he was formally adopted and whose name he took. In later years he came to be on friendly and intimate terms with the testator, but their meetings seem largely to have been confined to the occasions of the testator's visits to New York. There are two daughters of the testator's second marriage. The elder, Zelda, was 13 years old at the time of the testator's death, and the younger, Grace, was 12.

The testator's business is not stated, but he had some money. He had one sum of \$40,000 in the hands of a broker in Toronto, under some arrangement by which it was put out on call-loans. He had placed another sum of \$25,000 in the hands of his son

in New York, but whether by way of gift or for investment on the testator's account seems now to be in dispute. He had also a house in Toronto, in which he lived, and some other assets. Mrs. Morrison hints at some enterprises of a questionable character in which her husband was interested, but her faculty for bearing false witness is such that this hardly merits attention.

About ten years after their marriage the testator and his wife again separated. Divorce proceedings were taken, apparently by each of them against the other, but after some considerable time they came together again, and the divorce proceedings were dropped. At the time of the making of the will of January, 1939, relations between the testator and his wife seem to have been reasonably good. Mrs. Morrison preferred to live in North Carolina, her old home, and the testator bought or built a bungalow for her at Carolina Beach, on the sea coast, a few miles out of Wilmington. When the will of 1939 was made the testator was living alone in his home in Toronto, and his wife and daughters were down in North Carolina. A number of letters written by the testator to his wife in this period were put in at the trial. They are in terms of moderate affection. The letters filed make no reference to the will or to the testator's business affairs, but Mrs. Morrison says that he sent her by mail a signed copy of the will, enclosed with a letter that she did not keep. This copy of the will was produced at the trial and is Exhibit 2.

It was early in February, 1939, when Mrs. Morrison received the copy of the will, and she says that for safe-keeping she took it outside and buried it in the ground at Carolina Beach. Later she dug it up and placed it in a secret cupboard that the testator had made at the bungalow. Throughout she has always had this copy of the will in her possession or control. It should be stated that while this is always spoken of as a copy of the will, and is described in the document itself as a copy, it is not an exact duplicate of the original will. There are unimportant differences in its wording, but in substance its purport is the same.

In 1939 the testator and his family appear to have travelled rather frequently between Toronto and Carolina Beach. He joined his wife at Carolina Beach in the middle of February. Some letters written by the testator to his son between February 26th, 1939 and January 8th, 1940, within two weeks of his death, are the best indication of his attitude towards his

wife in this period when they were usually together. They are in strong contrast with the testator's letters to his wife in the period before the will was made. The following are some extracts from these letters:

In a letter written from Carolina Beach on the 26th February, 1939 he says, "Grace and the children want to build a bungalow down here and live all the year around, and if I do not agree to her plans there is going to be hell to pay. So what I am going to do, Billie, is let her have her own way and when she is settled, I am going to beat it back to Toronto, and then I will feel that I am not responsible for her actions, for she does the craziest things imaginable. . . . I have been here just two weeks, and I have not enjoyed one minute of it." In a letter of May 16th, 1939, he says, "Grace first says she is going to do one thing and the next minute changes her mind. It's just hell. If it wasn't for the two children I would desert her and let her shift for herself. . . . It is impossible to know what to do with or act with an insane person as she is." In a letter of July 17th, 1939, written from Toronto, he says, "You see, Billie, how crazy Grace is. She gives me about ten hours' notice to make preparations to make that long trip by auto, and if I don't do as she wants there is going to be war." On September 17th, 1939, writing from Toronto, he says, "I bought her that brand new house and furnished it for her with the expectation that she would stay down here, and that I would have a little freedom and do as I please for a while. Billie, the truth is that the woman is crazy. I go through hell day after day with her. . . . I have always had my own bed-room and always make sure that I lock the door before I retire, for I really am afraid of her." In a letter from Toronto, December 22nd, 1939, "This is third time I have started to write you, Billie, but the she-devil, Grace, interrupted me each time. . . . I am not happy here for she torments me from morning to night, but I guess according to law there is not a darn thing I can do about it. I will just have to put up with it." This letter also mentions a sum of \$40,000 on deposit with a firm of brokers in Toronto, which is set apart for the benefit of the testator's wife and daughters by the will of January, 1939. The letter says, "Now, Billie, this money is all yours after I am gone." In a letter from Wilmington of January 8th, 1940, he says, "I guess you will be surprised to learn that I am here, Billie. I didn't want to come but Grace insisted that we should

go, so I have to give in to her . . . I didn't get a chance to see Len or Abbie or Yolande, or any of them Xmas or New Year's as Grace wouldn't let me out of her sight, so you can imagine, Billie, what a merry Xmas I had."

As these letters indicate, the testator, with his wife and daughters, spent Christmas of 1939 in Toronto. They left early in January, 1940, for Carolina Beach. The testator was shot in the bungalow there at some time during the night of January 20th, and died early the next morning in the hospital at Wilmington. Mrs. Morrison was the only witness called at the trial who gave evidence regarding the events connected with her husband's death, and her evidence then given is amazingly in conflict with her evidence given at Wilmington in April, 1940, on the trial of her daughter, Zelda, who was charged with the murder of the testator. On the last mentioned occasion she said that the testator had been drinking heavily and was in a high state of excitement on January 20th, and threatened her many times. Later, after the younger child was asleep in bed and the elder girl, Zelda, was supposed also to have gone to bed, there was much heated argument between the husband and wife in his room; finally, he seized her and threw her down, threatening to cut off her tongue. At that moment the girl, Zelda, shot him with a rifle that was in the house. This story was given in evidence with much detail and vivid description. She said that she did not see her husband shot, but that she heard the gun and "he snatched back in the chair" and she escaped into the dining-room where Zelda was. Asked whether Zelda had the rifle at that time, Mrs. Morrison said, "I didn't even look. She must have had it in her hands." She also gave this evidence, referring to what happened when she ran into the dining-room;

"Q. Then for the first time you learned that Zelda had shot him? A. Yes, sir, I saw a gun in her hand. I said: 'My God, darling, what are you doing with that?' and she said: 'I think I hit him', and I leaned up against the stove and was crying."

On the trial of the issues regarding the will she gave an entirely different account of the shooting. After a somewhat busy afternoon and evening helping her husband to prepare for an intended trip to Mexico, she said that she went to bed before ten o'clock, the children being already in bed in the same room. Some noise wakened her, but she thought it was merely her husband moving about, and she went to sleep again. Later she

was awakened from a deep sleep by "a terrible noise," which she does not further describe, and she heard her husband scream. Zelda was also awakened by these sounds. The screaming continued, but they were afraid to go to see the cause of it, and, covering their heads with the blankets, they prayed to the saints for protection. Finally, she thought her husband "was sick or something" and went to him. She found him seated in a big arm-chair with blood running from him, and he "was screaming and cursing and moaning." She speaks of having heard some one else about, but who it was she does not know. She says there were "lots of glasses and lots of bottles," but there was no person in the room with her husband when she went to him. She asked her husband if she should get the police and he said "No". She gave a somewhat lurid description of the event along this line, but when asked about his having been shot with the gun, she answered, "I don't remember anything about a gun—I really don't."

Mrs. Morrison apparently thought her evidence on the trial of her daughter at Wilmington had not been taken down, and she did not know that the short-hand reporter who had taken it was present at the trial of these issues to give evidence of what she had said. When, in the course of cross-examination, counsel for appellant was about to confront her with what she had said at Wilmington and asked "You gave evidence in Wilmington when your daughter was tried down there?" her reply was, "Yes—but this is not Wilmington." Counsel then proceeded to read to the witness from the transcript of the Wilmington evidence, and from time to time asked her if these questions were put to her and were these her answers. The following are characteristic replies: when that part of her evidence that described her husband's violent attack upon her, with the threat to cut off her tongue, was read to her, her answer was, "I don't remember saying all that rot—I couldn't have said such things." As the reading continued her replies were "I don't know anything about that"; "I don't understand what he is talking about"; "I never heard of all this in my life". When her evidence describing the actual shooting of her husband by her daughter was read to her she said, "I never heard of all that rigmarole", but on the trial Judge telling her that she was just being asked a simple question, she said "I never heard the whole of it; I heard some of it." Later she described this part of her former evidence as "Mere

comedy for the newspapers." Again, still with reference to her evidence about the shooting, she said, "I don't know what you are talking about. I don't think any of this . . . in fact, I don't know exactly what you are talking about. In a way some of the questions sound familiar and some of them don't." Then towards the end of it she said, "I know there was no reporter in that chamber and some of those questions are absolutely correct and answers correct. I would have to sit down and examine which ones were correct and which ones were not correct. I cannot answer that as a whole." It seems to have begun to dawn upon the witness that she may have been too bold in her denials.

This part alone of the cross-examination of Mrs. Morrison fully justifies the comments made upon her as a witness by the trial Judge. Her repudiation of the evidence given by her on her daughter's trial at Wilmington and the substitution for it of an account of the shooting of her husband that omits both herself and her daughter from the scene cannot be accepted for one moment. She would be a strange mother who, on the trial of her young daughter for the murder of her father, would swear that she heard the shot and saw the girl with a gun in her hands in the next room, and that the girl then said "I think I hit him," if neither she nor her daughter was in any way concerned in the shooting and the facts were to her knowledge that her daughter was in bed in the same room with her when the shooting occurred, and that neither of them left her bed for some little time afterwards.

It is important to discover the purpose of Mrs. Morrison's prevarications. Two matters of significance are to be noted in her altered testimony. In her later story she eliminates the violent quarrel between herself and her husband that immediately preceded the shooting in her evidence at Wilmington. In her later story the shooting is not done by her daughter in defending her from her husband's attack, but some person unknown is introduced—some one who presumably shot the testator and then or later made off with his will.

Mrs. Morrison and her daughters went to jail on the day of the testator's death, January 21st, 1940, but Mrs. Morrison was not held there for more than two or three days. On 23rd January she was formally appointed guardian of her daughters by a North Carolina Court, and evidently had legal advice. She

says that when she returned home to the bungalow it had been ransacked. Describing the search made for the will she says, "We dug everything up down there and I had other people working. And took all the lining out of my car. We dug everywhere on the plantation, thought Mr. Morrison had put it away but couldn't see how he could." She also says that she wrote persons that the testator had known, some here and some in Europe, asking them to help her find the will and also wrote to a newspaper. There is not a particle of corroboration of any of this. One would suppose that if the bungalow had been ransacked in her absence the police or some of her relatives could give evidence of it. And the persons who assisted in searching for the will could have told of it. Furthermore, Mrs. Morrison, according to her story, had seen the will put in a despatch-box in her husband's bedroom on the evening of 20th January, and why she should dig "everywhere on the plantation" and search the lining of her car and write persons in Europe, it is difficult to understand in the circumstances. Without corroboration it is impossible to regard this evidence as the statement of anything that really happened. That the will was lost and was not in the possession of Mrs. Morrison herself is of vital importance, and if any witness could be found to corroborate Mrs. Morrison the value of such evidence would not have been overlooked.

The trial of the daughter, Zelda, was concluded early in April, 1940, and Mrs. Morrison then came to Toronto to see about her husband's estate. She consulted a solicitor and almost immediately returned to North Carolina to get the signed copy of the will (Ex. 2), which she had left in the secret cupboard at the bungalow. The will of September, 1930, had been admitted to probate on 20th February, 1940, by the Surrogate Court of the County of York on the application of National Trust Company Limited. One would have supposed that with the signed copy of the will of January, 1939, which had revoked the earlier will, there would have been no delay in having the probate of the will of 1930 revoked. The widow would fare better on an intestacy than under the earlier will, which gave her nothing and left the bulk of the estate to appellant. Instead of proceeding in this way an application was made on the widow's behalf under The Dependants' Relief Act (R.S.O. 1937, ch. 214). In her affidavit in support of this application, sworn on 17th April, 1940, no reference whatever is made to any will of later date than the

will of September, 1930, that had been admitted to probate, and that will is more than once referred to in Mrs. Morrison's affidavit as the will of her late husband. No explanation of all this is made beyond Mrs. Morrison's statement that her solicitor, to whom she showed the copy of the will of 1939, said that the copy was of no use, and yet it was after seeing him that she had gone back to North Carolina for the copy. Mrs. Morrison had more than one solicitor before the present proceedings were instituted in January, 1941, and she makes the same explanation serve for all of them. The application under The Dependants' Relief Act was never brought to a hearing, although an appointment for that purpose, returnable early in May, 1940, was issued. None of Mrs. Morrison's several legal advisers was called to explain the course that was taken or to corroborate any of her statements.

As already stated, the original will of January, 1939, was delivered by Mrs. Morrison to Guaranty Trust Company of Canada early in December, 1940. It was then torn and discoloured as it is now. Mrs. Morrison says that on the evening of November 30th, 1940, the will was handed to her by a stranger who came to the door of their home on Sheldrake Boulevard, Toronto. She says it was then intact but stained with blood. She has given in her evidence a description, in her characteristic manner, of her conduct and her reactions upon this occasion. She tells of her attempts to wash off the stains, and not succeeding, she says she tore the will as it is now torn and threw the pieces into the trash-box under the kitchen sink. Later she recovered the will from there and finally decided to take it to the Guaranty Trust Company.

There is not a particle of corroboration of any of this, and the trial Judge did not believe it. He finds that the will could not be found after the testator's death, not because he believed Mrs. Morrison, but simply because he thought Mrs. Morrison would have produced the will earlier if she had had it. Upon the same reasoning he finds that some unknown person had the will in his possession until 30th November, when it was returned to Mrs. Morrison "as she said, or in some such mysterious manner." He refused to accept her statement that the will was then intact and was later torn by her. On the contrary he finds that the will was torn as it is now when it was returned to her. With all respect to the trial Judge these are not findings based upon any

evidence that he deemed credible, but are simply his own conception of what likely happened, and of what Mrs. Morrison's conduct would be in circumstances that he supposes.

I do not think the trial Judge went in the least too far in his characterization of Mrs. Morrison as an unreliable witness, wholly unworthy of credit. With respect, I am of the opinion that he erred in endeavouring to discover the truth by applying the standard of logical conduct to anything in which she is concerned. Doubtless she has a high regard for her own interests, but she has her own methods of protecting them. Her ways of securing due obedience from her husband are probably stated with sufficient accuracy in his letters to his son, and they seem to have been effective. We have nothing from her several legal advisers, either in North Carolina or here, but her references to them in her evidence would indicate that she was probably an unsatisfactory client, who took their opinions and acted upon her own. There is nothing but Mrs. Morrison's statement that she showed them the signed copy of the will and that they all said it was of no use. There is nothing but her statement that she did not produce to them, or to some one of them, as, for example, her attorney in North Carolina, the original will, torn and revoked, long before November, 1940. It is not inconceivable that she changed from one solicitor to whom she had disclosed too much, to another from whom she concealed what was unfavourable to her case. This is, it may be, mere surmise, but for present purposes the point I am making is that, in my opinion, it suggests an explanation of Mrs. Morrison's conduct at least as probable as that upon which the trial Judge proceeded.

Mrs. Morrison was the only witness called who had any actual knowledge of the will from the time the testator put it in his pocket upon its execution in January, 1939, until she produced it to the Trust Company in December, 1940. She was also the only witness called who had knowledge of the facts of the shooting of the testator and immediately preceding it. As a witness she is wholly unworthy of any credit. There are some matters upon which there might be corroborative evidence from other persons. One or both of her daughters could speak of the incidents of January 20th, 1940, and also of the will, which if Mrs. Morrison's story is true, she showed them on the morning after it was mysteriously returned to her. Others could speak of the search for the will after the testator's death, if the will

was lost and a search was made as Mrs. Morrison says. It is highly improbable that if such an important document was in fact lost, no one but Mrs. Morrison should be able to give evidence of the loss and of the efforts to find it. Yet it is of the first importance in this case that the loss of the will should be proved and not left to mere inference from the conduct of such a person as Mrs. Morrison. It must have been obvious to respondent's legal advisers that Mrs. Morrison's credibility would be seriously challenged, and the omission to call corroborative evidence where it was available is, in the circumstances, more than matter for comment.

In *Colvin v. Fraser* (1829), 2 Hagg. Ecc. 325, speaking of a lost will, Sir John Nicholl said:

"It was in the deceased's possession—it was not to be found at his death; the first presumption is that the deceased himself destroyed it; if that presumption of fact be not repelled by evidence then the legal consequence will also *prima facie* be that the duplicate remaining in India is revoked.

"This presumption of fact and this legal consequence may be rebutted by satisfactory evidence; but the burthen of proof lies upon the party setting up the will—whether he sets it up by propounding a draft, a duplicate, or a cancelled will, for whether the paper be found cancelled, or whether it be wholly removed and not found at all, still the first presumption as to the person who did the act is the same. The force of the presumption and the weight of the onus may be different according to circumstances; but the Court, in order to pronounce for a draft or a duplicate, or a cancelled will, must be judicially convinced that the absence or cancellation of the paper once in, and not traced out of, the deceased's own possession, was not attributable to the deceased. This negative may be established by a strong combination of circumstances leading to a moral conviction that the deceased did not do the act, or it may be established by direct positive evidence in different ways, such as by proving the existence of the instrument after the testator's death—by proving that he himself destroyed it when of unsound mind, or by error, or under force *sine animo revocandi*—or by proving that it was fraudulently destroyed by some other person; but under this last supposition the proof must be clearer, because a fresh presumption arises—the presumption in favour of innocence; for if a

fraud is charged, it must be clearly proved by facts and circumstances leading to a conclusion of guilt."

There have been many cases of wills not forthcoming after death in which the presumption of revocation has been applied. In *Welch v. Phillips* (1836), 1 Moo. P.C. 299, Baron Parke stated the presumption in this way: "if a will, traced to the possession of the deceased and last seen there, is not forthcoming on his death, it is presumed to have been destroyed by himself; and that presumption must have effect unless there is sufficient evidence to repel it." This statement of the presumption was approved in *Allan v. Morrison*, [1900] A.C. 604. In *Finch v. Finch* (1867), L.R. 1 P. & D. 371, Lord Penzance stated the presumption in a somewhat more limited way. He said, "It is the non-existence of the paper at the time of death which leads to the legal presumption of revocation. . . . To support that presumption the Court must be satisfied that it was not in existence at the time of death." The same limitation seems to be implied by Lord Penzance (then Sir James P. Wilde) in *Eckersby v. Platt* (1866), L.R. 1 P. & D. 281, where he speaks of the presumption as one that applies to "a will which was in the testator's custody until his death and could not then be found." In *In re Sykes, Drake v. Sykes* (1907), 23 T.L.R. 747, the view expressed by Lord Penzance in *Finch v. Finch* was disapproved. It was said that "to require evidence of the non-existence of the will" (at the time of death) "would be to deny the presumption"; see also *Re Perry* (1924), 56 O.L.R. 278, where, at p. 281, it is said "the heretical statement of Lord Penzance in *Finch v. Finch* . . . is overruled by *In re Sykes*."

In referring to the presumption in case of a will not found after death, it is said in *Re Perry* that "the presumption is against fraudulent abstraction either before or after death." In other cases (e.g., *Colvin v. Fraser, supra*) it is said that "the presumption in favour of innocence arises."

The presumptions of innocence, and of destruction by the testator, who alone had the right to destroy the will, apply in the case of a mutilated will as well as in the case of a will that is not forthcoming after the death of the testator. It is so stated in the *dictum* of Sir John Nicholl in *Colvin v. Fraser*, already quoted, and is directly covered by his judgment in *Lambell v. Lambell* (1831), 3 Hagg. Ecc. 568. See also *Bell v. Fothergill* (1870), L.R. 2 P. & D. 148. Speaking generally, and without re-

gard to the particular facts of any special case, the difference between the case of a will that is found so mutilated as to be considered destroyed, and the case of a will that is not forthcoming after the death of the testator, so far as the presumption now under consideration is concerned, would seem to lie in this, that in the latter case there is a primary presumption from the fact that the will is not forthcoming, that it has been destroyed. This primary presumption is, of course, not necessary in the case of a will that is found destroyed. A perusal of many of the cases leads to the conclusion that where a will has been last seen prior to the death of the testator in his possession or custody, and when found after his death it has been destroyed, a presumption, in default of explanation, that the testator himself destroyed the will with the intention of revoking it, has commonly been taken for granted.

It appears in this case to have been recognized by Guaranty Trust Company, when propounding the will of January, 1939, for probate, that on the face of things it was necessary to explain the plight of the document propounded. Accordingly, it filed with the application for probate the affidavit of its officer who received the torn will from Mrs. Morrison, to explain that it was received from her in its present condition, and the affidavit of Mrs. Morrison setting forth her story of the will not having been found after the testator's death and its later return to her still intact by a stranger in Toronto, and of her tearing of the will—generally as sworn by her at the trial of the issues. Thereupon, a citation was issued by order of the Surrogate Court Judge which recited that it was desirable that the validity of the will of January, 1939, should be determined, and the persons interested were cited to enter an appearance. The Court—I think properly—required that, notwithstanding the affidavits filed, the document propounded should not be admitted to probate until proof had been given, on notice to the persons interested in the estate, that the document it had before it was the true last will of the testator.

All the conditions necessary to raise the presumption of revocation by the testator are present here. The will was in the possession of the testator. All parties concede that—respondents, because Mrs. Morrison swears to it, and the appellant, because the will is shown to have been in the testator's possession immediately after its execution, and there is no evidence of

any change of possession so long as he lived. In my opinion the further finding of fact should be made that when the will was found after the testator's death, it was where he had had it and was in its present condition. That, of course, is not what Mrs. Morrison says, but her evidence is not to be accepted. So far as appears from the evidence other than her own, she is the only person who had the will in her possession after the testator's death and before it was delivered to Guaranty Trust Company. The learned trial Judge concluded, by inference from circumstances, that for a time after the testator's death the will was in the possession of some other person unknown before it came to the hands of Mrs. Morrison, and I have already commented upon that finding. Mrs. Morrison and her two children were the only occupants of the house at Carolina Beach when the testator was shot and when he was removed to the hospital, and so far as appears, when he died. I am of opinion that no credit can be given to Mrs. Morrison's statements that suggest the presence there of some unknown person. Neither can credit be given to her statement that the house was ransacked in the day or two that she spent in jail, nor to her statements that the will was gone and was returned to her by a stranger in November, 1940. The will was undoubtedly in Mrs. Morrison's possession in its present mutilated condition when it was first seen by anyone who has been called as a witness, other than Mrs. Morrison herself, after the death of the testator. Failing any explanation of her possession that can be accepted the conclusion is inevitable that Mrs. Morrison herself obtained possession of the will on her husband's death, and as it is not credible that she tore it, it must further be found that it was then torn as it is now.

It is impossible to accept Mrs. Morrison's statement that she told her several solicitors of the will of January, 1939, and of the signed copy of it in her possession. She says that she told Mr. Bogart, the solicitor at Toronto whom she retained in April, 1940, and who instituted proceedings on her behalf under The Dependants' Relief Act, about it the first time she consulted him. It is impossible to accept that statement in view of the affidavit of Mrs. Morrison, drawn by Mr. Bogart and sworn to by her on 17th April, 1940, in which the will of September, 1930 (probate of which had already been granted to The National Trust Company) is accepted without question as her husband's will, by which

the disposition of his estate is governed. Further, Mrs. Morrison frequently called at the offices of The National Trust Company and saw Mr. Partridge, assistant estate-officer, the first time being in the latter part of April, 1940. She was there to try to get some money to live on. Mr. Partridge also corresponded with her solicitor. At no time was there mention of any will other than that which had been probated. It seems to me to be obvious that, acting on some idea or plan of her own, Mrs. Morrison was deliberately concealing the will of 1939, and her copy of it, and all information in relation thereto. It is not wholly undeserving of notice that although the proceedings under The Dependants' Relief Act were instituted just before the end of the period of three months after the death of the testator, fixed by sec. 4 of the Act, the matter never came on for hearing. It was kept alive until as late as December, 1940. Mrs. Morrison says the delay was because the Judge was never available to hear it, but no one else has said so. I am unable to escape a suspicion that Mrs. Morrison never intended that the matter should come to hearing, but that having a tenacious purpose from the first to establish the will of 1939, these proceedings afforded her a convenient stop-gap, delaying distribution until she had invented, or deemed it a convenient time to announce, the recovery of the will through the hands of a stranger.

The facts proper to be found are, in my opinion, that the will was kept by the testator in his own possession or custody during his lifetime, and that after his death it was found at his residence where he had it, torn as it is now. Upon these facts being found the presumption applies that the will was torn by the testator himself with the intention of revoking it.

There is nothing to rebut this presumption. The best and strongest evidence of the testator's attitude towards his wife during the months preceding his death is to be found in his letters to his son. The state of mind that they disclose is in accord with the circumstance that he was shot in his own house while engaged in a violent quarrel with his wife. The fact that Mrs. Morrison later altered her story by denying that there was a quarrel would seem to attach significance to it. In a similar way her attempt in her later story to introduce some unknown person as the probable actor in the shooting suggests that she thought her first evidence was lacking in something

to be desired if she was to avoid a finding that she was the person who took possession of the will. The finding, based upon the presumption, must therefore be that the will of 1939 was revoked by the testator by tearing it with the intention to revoke it.

The appeal must be allowed, and in lieu of a declaration that the will dated 30th January, 1939, is the true last will and testament of the deceased, it should be declared that this will was revoked by the testator, and that he died intestate. If it is thought that it is necessary that the order of this Court should proceed to deal further with the administration of the estate, the matter may be spoken to.

The costs of all parties of the appeal, as well as of the earlier proceedings, should still, I think, be paid out of the estate. It may be unusual to allow costs to a person whose conduct has been of the character of that of Mrs. Morrison in this matter, but I think that both at the trial and on the hearing of this appeal, counsel on her behalf were definitely of assistance to the Court in placing before the Court the real issues to be determined, while at the same time fully performing their duty to their client.

HENDERSON J.A. agreed with ROBERTSON C.J.O.

MASTEN J.A.:—This is an appeal by William G. Schoonover, a son of the testator, from the judgment or order of His Honour Judge Shea dated May 22, 1941, whereby he declared that the paper writing filed in Court bearing date the 30th January, 1939, and signed by W. H. Morrison is the true last will and testament of the said William Herbert Morrison, deceased, and did order and adjudge accordingly, and directed that letters probate of the said will should issue to the Guaranty Trust Company.

The appeal is brought on the ground that the learned trial Judge erred in that, having regard to all the circumstances disclosed in evidence, he should have found that the will had been revoked by the testator in his lifetime, and on the further ground that the learned trial Judge erred in holding that the will was in the possession of some unknown person up to the 30th day of November, 1940, and third, because he should have found that the testator died intestate.

Before this Court no questions arise in respect to the following matters:

1. The due and proper execution of the will by the testator;
2. As to fraud or undue influence in procuring its execution.

The question for determination by this Court is whether upon consideration of the various facts and circumstances which appear in evidence probate ought to have been granted by the Surrogate Judge.

The following facts appear to be uncontroverted. A valid will was duly executed by William H. Morrison, the testator, on the 30th January, 1939, by which certain substantial benefits accrued to one Grace Morrison, the wife of the testator. Counsel for the respondent admits that this will was in the custody of the testator at his home in North Carolina until the night of the 20th of January, 1940. On the night of the 20th of January, 1940, William H. Morrison, the testator was shot and he died about 5 o'clock the next morning.

The will in question is produced as Exhibit 1. It is torn into five pieces, but it is complete including the signatures of the testator and two witnesses. Some of the pieces and the enclosing envelope clearly show stains which are said to originate from blood. This fact is not established by expert testimony, but was so stated by Grace Morrison in her evidence before the Surrogate Judge.

On the 30th November, 1940, the will was in the possession of Grace Morrison. There is no evidence disclosing in whose possession the will remained from January 20th, 1940, till November 30th, 1940. After the death of her husband Grace Morrison, the wife, lived in their home at Federal Point, North Carolina, from about February 6th, 1940, till April 11th or 12th. (See the evidence, page 163). During the time of this residence Grace Morrison was from January 20th, 1940, continuously acting under legal advice, but there is no evidence of any effort by her through the police or other public authority with regard to the alleged ransacking of the home or for the recovery of the will, which she alleges was taken away during her incarceration.

The only witness on the question of revocation and as to the possession of the will by some unknown person between the 20th day of January and the 30th day of November is Grace Morrison. She is financially interested in establishing the will as against the alternative of intestacy, and her evidence is not corroborated by any other witness nor by admitted facts.

The evidence establishes that the relations between the testator and his wife were difficult and strained, and it is established that on the trial of Zelna Morrison for the murder of her father, Grace Morrison swore that on the night of January 20th, 1940, when the testator was shot, a violent quarrel was proceeding between her and her husband. It is also established that on that murder trial Grace Morrison testified that the testator had "cut her out of his will". Subsequent to April, 1940, she instituted proceedings in Toronto under The Dependents' Relief Act and filed an affidavit (Exhibit 8 in this proceeding) which is entirely inconsistent with the continued valid existence of the will in question.

The crucial point in connection with this whole appeal appears to me to depend on whether effect is to be given to the evidence of Grace Morrison where she testifies that the will in question disappeared from the family residence during the incarceration of herself and her daughter after January 30th, 1940, and remained in the possession of some unknown person until it was mysteriously brought to her on the 30th November, 1940.

In that respect it seems to me to be important to refer to the words of her evidence as given before the Surrogate Judge. On page 68 of her evidence-in-chief, when being questioned as to the alleged return to her of the will in question, she is asked:

"Q. Did you go to the door? A. I opened this far—

"Q. What, if anything, took place? A. I went to see what he had to say. He said, 'Are you the widow Morrison'. I said, 'Yes.' He said 'Here'—that was all. He didn't say, 'Mrs. Morrison'. He said, 'Are you the widow Morrison,' and handed me an envelope."

At page 71:

"Q. You took Exhibit No. 5 out of Exhibit No. 6, and what did you do with Exhibit No. 5? A. It had blood on it. I knew it was blood. (Note) (Exhibit 5 is the envelope containing the torn pieces of the will).

"Q. What did you do with Exhibit No. 5? A. Well, I looked at it and I saw there was blood all over it.

.....
"Q. Did you find anything inside Exhibit No. 5? A. I pulled this out.

"Q. The witness says refers to the will Exhibit No. 1. Did you look at Exhibit No. 1? A. It wasn't like this.

"Q. I am just asking you, did you look at it? A. I just—yes.

"Q. What did you find? In what condition did you find it? A. It had a few of those stains on it too, inside.

"Q. Was it all in one piece, or torn, as you see it now? A. No; it was all in one piece. I saw there was even blood on the inside."

At pages 72-73:

"Q. What did you do with the will, if anything? A. I looked at it and I thought they might not bring back at all if there was blood on it. I started throwing it in the fire.

"Q. Did you start to throw it in the fire? A. Then I started to see if I could wash it out.

"Q. I took it out in the kitchen and I tried to wash it."

At pages 74-75:

"Q. What next did you do? A. I was terribly worried. I didn't know—

"Mr. Kellock objects.

"A. I simply picked it up and thought maybe I better throw it away. I took it and smashed it down the middle.

"Q. Don't tear this again, please. I presume that is the full will. Show me what you did with it, if you can remember. A. Well, it was still wet. I just picked it up to shake it to see if it was all dry. I felt,—'Heavens,'—somebody has killed my husband and will kill me and the two girls too. I said, 'I will throw it all away and go home.'

"Q. You say you picked it up by the top. A. I picked it up by the top and tore it down the middle and put the pieces together and started to tear it again.

"Q. Can you tell me, looking at the document Exhibit No. 1, the tears that now appear upon it, who tore them, if you know? A. I tore them."

At pages 76-77:

"Q. Did you do anything about the will the night before—which you threw in the scrap pail, or whatever it was. A. When I came down, while they were getting dressed, I took it out, the paper, and put it under the hall rug.

"Q. You took out the—. A. The pieces.

"Q. The pieces; and put it under—. A. Yes.

"Q. The hall rug, is that right? A. Yes.

"Q. For what purpose? A. It was a safe place to put it."

Dealing with this question, the learned trial Judge says, at page 284:

"I must say that in general I do not accept the evidence given by Mrs. Morrison. Her attitude in the witness-box, her manner of answering questions, the contradictions and variations in her testimony, convince me that she is quite regardless as to whether she is telling the truth or not. She answers very quickly and apparently without much thought. She does not appear to have a very clear appreciation of the distinction between truth and falsehood. I accept her evidence only where it is corroborated by other evidence, or where the circumstances or strong probability render it credible. I believe the will came into her possession as she said, or in some such mysterious manner, because it would have been to her best interest to produce it long before if she had it, and because there was nothing to be gained, and everything might have been lost, by concealing it. It is inconceivable that if this will, which left a large share of her husband's estate to her and her children, had been in her possession or under her control during the ten months from January to November, 1940, she would not have produced it.

"I wholly disbelieve her evidence that she tore the will. She had been looking for the will for months; she had a copy and knew its provisions, I and I cannot believe that even if actuated by fear or nervousness or both, she would attempt to destroy it.

"I find that the will disappeared from her husband's room the night he was shot, or within the next few days; that it was in the possession of some unknown person up to the 30th of November, and that it was returned to her on or about that day in the condition it is in at the present time."

I am in full agreement with the observations of the learned trial Judge when he says: "In general I do not accept the evidence of Mrs. Morrison." "She is quite regardless as to whether she is telling the truth or not."

I also agree with his finding already quoted, viz.: "I wholly disbelieve her evidence that she tore the will."

Notwithstanding these views and conclusions he credits the fantastic story told by Mrs. Morrison to the effect that "the will disappeared from her husband's room the night he was shot,

or within the next few days; that it was in the possession of some unknown person up to the 30th of November, 1940, and that it was returned to her on or about that day in the condition it is in at the present time," though Mrs. Morrison's evidence is that it was untorn when she received it. He reaches that conclusion because he thinks "it would have been to her best interest to produce it long before if she had it, and because there was nothing to be gained and everything might have been lost by concealing it." He seems to have overlooked the fact that both the torn pieces of the will and the envelope bore stains which Mrs. Morrison positively asserts to be blood stains. If the document was in her possession in its present torn condition with blood stains on it, from the time when the testator was shot, it is obvious why she would not produce it. This suspicion arises more strongly if one bears in mind Mrs. Morrison's evidence at the murder trial, viz., that a violent quarrel was proceeding, that she was in physical danger, and that the daughter Zelda shot her father.

For these reasons I am unable to agree with this finding of the trial Judge. After a perusal of all the evidence and exhibits, and after mature consideration of all the facts and circumstances of which the foregoing is a partial statement, I think that they afford adequate grounds for the very strong suspicion which I entertain that the will was torn by the testator *animo revocandi* in the midst of the quarrel during which he was shot, or immediately thereafter, and that the torn pieces of the will with the blood stains on them were in the possession of Grace Morrison from January 30th, 1940, until they were delivered by her to the Trust Company.

It remains to consider next whether in consequence of these suspicions the onus is cast by law on the party propounding the will to satisfy the Court that such suspicions are not warranted.

In 34 Halsbury, 2nd ed., paragraph 124, the rule as applicable to this case is stated substantially as follows. (I do not quote the exact words.)

Where a will is found destroyed or mutilated in a place in which the testator would naturally put it, the presumption is that the testator destroyed it and that the destruction was done *animo revocandi*. But the presumption may be rebutted by a

consideration of circumstances shewing that it has been mutilated or destroyed without his privity or consent.

It was settled by the case of *Allen v. Morrison*, [1900] A.C. 604, that where a will duly executed is traced to the testator's possession and last seen there, and is not forthcoming on his death, the presumption is that it was destroyed by himself.

In my opinion a like presumption arises where a will is produced, destroyed or mutilated in such a way as to indicate by its very appearance an intention to revoke it, though it is quite true that this presumption may be rebutted by surrounding circumstances: *Harris v. Berrall* (1858), 1 Sw. & Tr. 153.

The will in question as produced in Court is torn into five pieces. Its condition is such that, in my opinion, the tearing, if done *by the testator*, was of such a character as to show *prima facie* an intention to revoke.

No doubt mutilation may be of such a character that it fails to show an intention to revoke, as for example, in *In re Cowling*, [1924] P. 113.

But in the present case, upon a consideration of the nature and extent of the tearing of this will into five pieces, with blood stains upon it, and a consideration of the surrounding circumstances, I am led to the view that the tearing was of such a nature as to manifest that it was done by way of a symbol of the determination to make an end of the will.

In the leading case of *Barry v. Butlin* (1838), 2 Moore's Privy Council, p. 480, Baron Parke in beginning his judgment says:

"The rules of law according to which cases of this nature are to be decided, do not admit of any dispute, so far as they are necessary to the determination of the present appeal; and they have been acquiesced in on both sides. These rules are two: the first that the *onus probandi* lies in every case upon the party propounding a will; and he must satisfy the conscience of the Court that the instrument so propounded is the last will of a free and capable testator."

This case has been followed and approved from the time it was pronounced, and is referred to at length in Williams on Executors, 12th ed., vol. 1, at p. 66. At page 69 of that volume, it is said:

"The rule in *Barry v. Butlin* is not confined to the single case in which a will is prepared by or on the instructions of a person

taking large benefits under it, but extends to all cases where circumstances exist which excite the suspicion of the Court; and whenever such circumstances exist, and whatever their nature may be, it is for those who propound the will to remove such suspicion and to prove affirmatively that the testator knew and approved of the contents of the document; and it is only where this is done that the onus is thrown on those who oppose the will, to prove fraud or undue influence or whatever else they may rely on to displace the case made for proving the will." Citing *Tyrrell v. Painton*, [1894] P. 151, at 157.

In the case of *Tyrrell v. Painton*, [1894] P. 151, it was held that wherever a will is prepared and executed under circumstances which raise the suspicion of the Court, it ought not to be pronounced for unless the party propounding it adduces evidence which removes such suspicion, and satisfies the Court that the testator knew and approved of the contents of the instrument at the time of his death.

Tyrrell v. Painton was referred to in *Riach v. Ferris*, [1934] S.C.R. at p. 726, where Duff C.J. draws attention to it and cites with approval the words of Lord Davey, where he says:

"The principle is, that wherever a will is prepared under circumstances which raise a well-grounded suspicion that it does not express the mind of the testator, the Court ought not to pronounce in favour of it unless that suspicion is removed."

The principle was applied by this Court in *Sellers v. Sullivan* (1918), 43 O.L.R. 528. I tried that case, and while I thought that there were grounds for suspicion, I pronounced in favour of the will. The Court of Appeal reversed my conclusion and stated that I should have held that in view of the suspicious circumstances the onus rested on the defendant to remove the suspicion from the mind of the Court before sustaining the will.

See also the following cases where the principle was applied and probate refused: *Brown v. Fisher*, 63 L.T.R. 465; *Fulton v. Andrew*, 7 E. & I. App. 448; *Re Delmedge Watt v. Hyde*, [1935] O.W.N. 24; *Wannamaker v. Livingstone*, 43 O.L.R. 243.

It is to be observed that all the cases above mentioned relate to grounds of suspicion that occurred in connection with the drawing or execution of the will, and I have searched in vain for a case arising out of the alleged revocation of a will. Nevertheless, I venture to think that the principle is broad enough to make it applicable as well to the revocation of a will as to its

creation. In each case the inquiry of the Court is directed to the determination of the same question, namely, does the instrument in question represent "the last will of a free and capable testator?"

If I am right in the views so far expressed, it follows that the Court should refuse probate; for the suspicions to which I have referred, if based on sufficient grounds, have not been removed by those propounding the will for probate.

In the result I would allow the appeal with costs, as proposed by my Lord the Chief Justice and decline to grant the application for probate of the instrument tendered. This results in an intestacy for the will of 1939 which was in force for some time revoked the earlier will.

Appeal allowed.

[COURT OF APPEAL.]

Gives v. Canadian National Railways.

Negligence—Ultimate negligence—Effect of The Negligence Act, R.S.O. 1937, ch. 115, on doctrine of ultimate negligence—Questions to be submitted to jury.

In a negligence action tried with a jury where questions are put by the trial Judge to the jury asking the jury to find whether there was any negligence on the part of the defendant which caused or contributed to the accident, and whether there was any negligence on the part of the plaintiff which caused or contributed to the accident and asking them to state in what such negligence consisted, no purpose can be served since the enactment of The Negligence Act, R.S.O. 1937, ch. 115, by submitting any further question as to ultimate negligence. The jury, however, should be properly instructed as to what negligence comes within the description of negligence that caused or contributed to the accident: *McLaughlin v. Long*, [1927] S.C.R. 303, considered.

However, it does not necessarily follow that in all negligence cases it will be sufficient to submit questions to the jury in the form of asking them whether there was any negligence on the part of the plaintiff or the defendant which caused or contributed to the accident and asking them to state in what such negligence consisted. In the multitude of negligence cases with their infinite variety of circumstances, there may well be cases where to determine the essential facts it will be necessary to put questions to the jury that are somewhat more refined than the broad questions as to whose negligence and what negligence caused or contributed to the loss or damage. The form of the questions must be left to the good judgment of the trial Judge to deal with in each case as it arises.

AN appeal by the defendant from a judgment of Mackay J. after the trial of the action with a jury at London.

October 8th and 9th, 1941. The appeal was heard by ROBERTSON C.J.O., MASTEN and HENDERSON JJ.A.

R. E. Laidlaw, K.C., for the defendant, appellant.

A. M. LeBel, K.C., for the plaintiff, respondent.

October 27th, 1941. ROBERTSON C.J.O.:—An appeal by the defendant in the action from the judgment of Mackay J., dated 25th April, 1941, after the trial of the action before him with a jury at London.

The action was for damages arising from an accident on the railway crossing at Maitland St. in the City of London, as the result of which the respondent's husband and young son were killed. They were passengers in a motor-car owned and driven by the husband's brother. They were travelling north on Maitland St., and on coming to the railway crossing proceeded on their way across at a moderate speed. There are a number of tracks to cross. The distance across the tracks from south to north is 200 feet or more. A passenger-train of appellant's

was approaching the crossing from the east at the same time, on the most northerly track. It was travelling somewhat faster than the motor-car. The time was about nine o'clock in the evening of 27th April, 1940, and it was dark and the passenger cars were lighted, and the headlight of the engine was on. There was nothing on the tracks to obstruct a clear view from the highway crossing for a considerable distance to the east along the track on which the train was approaching. The driver of the motor-car did not see the train and continued on his way over the crossing until his motor-car ran into the side of the west-bound locomotive. The husband and son of the respondent were killed in the collision, while the driver of the car escaped practically uninjured.

The crossing is not what is called a "protected crossing", that is, there are no gates nor automatic signals to protect persons from getting in the way of railway traffic or to warn of its approach, but appellant had a watchman stationed there. The watchman's shelter is to the east of the highway, and is some 30 feet to the south of the track upon which the west-bound train was travelling. It was the watchman's duty to be on the crossing to warn persons using it on the approach of a train. He was supplied with a lantern showing a red light, to be used for that purpose at night.

The findings of the jury were as follows:

"1. Was there any negligence on the part of the defendant or its servants which caused or contributed to the accident? Answer Yes or No. Yes.

"2. If so, in what did such negligence consist? Answer fully—Watchman late in taking his place on crossing to warn traffic. (This is based on the time the car would take to arrive at the scene of the accident after the watchman first saw it on leaving his shanty).

"3. Was there any negligence on the part of Lorne Gives which caused or contributed to the accident? Answer Yes or No. Yes.

"4. If so, in what did such negligence consist? Answer fully—Lack of precaution. Should have seen train if looking. Boy should not have been standing, which prevented clear vision.

"5. If you find there was negligence on the part of the defendant and Lorne Gives state the degree of fault or negligence. The defendants—20 per cent.; Lorne Gives—80 per cent.

"6. Notwithstanding negligence (if any) of the defendant, could Lorne Gives have avoided the accident by the exercise of reasonable care on his part? Answer Yes or No. Yes.

"7. If so, how could he have done so? Answer fully. By keeping the boy seated so his vision was not interrupted.

"8. Notwithstanding the negligence (if any) of Lorne Gives, could the defendant have avoided the accident by the exercise of reasonable care on its part? Answer Yes or No. Yes.

"9. If so, how could it have done so? Answer fully. Watchman should have been on crossing sooner so as to have had time to have attracted Gives' attention by waving his light.

"10. At what amount do you assess the damages?

(a) Evelyn Gives (the widow)\$2,000

(b) Marlene Gives (the child) 456

(The amount of damages assessed is based on the percentages of blame with full damages at \$10,000 for the widow and \$12 per month for 15 years and 10 months for the child.)"

Upon these answers the trial Judge directed judgment to be entered for the plaintiff for the damages found by the jury.

The appeal was fully and ably argued by counsel for both parties, and at the conclusion of the argument I was unable to see any ground upon which we could disturb either the findings of the jury or the judgment directed to be entered thereon, subject to this reservation, that I desired to consider further the answers of the jury to Questions 6, 7, 8 and 9, and their effect. The learned trial Judge in his charge to the jury told them that these questions have to do with what is called "ultimate negligence", and on the argument of the appeal counsel so dealt with them.

Assuming for the moment that the acts of negligence on the part of appellant's watchman and of Lorne Gives respectively, set forth by the jury in their answers to Questions 7 and 9, can be properly classed as "ultimate negligence", and that both of them could be guilty of "ultimate negligence", can any effect be given to these findings of the jury in view of their answers to the first four questions, and in view of the provisions of The Negligence Act? In my opinion no effect can be given to them.

The Negligence Act, R.S.O. 1937, ch. 115, in sec. 2, subsec. (1), provides that "when damages have been caused or contributed to by the fault or neglect of two or more persons the court shall determine the degree in which each of such persons

is at fault or negligent." The subsection then provides that except as provided by subsecs. 2 and 3, when two or more persons are found at fault or negligent, they shall be jointly and severally liable to the person suffering loss or damage, but as between themselves, in the absence of contract, each shall be liable to make contribution and indemnify each other in the degree in which they are respectively found to be at fault or negligent. By subsec. (2) it is provided that in any action brought for loss or damage resulting from bodily injury to, or the death of any person being carried in a motor vehicle, (as in the present case) where the owner or driver of the motor vehicle is one of the persons found to be at fault or negligent, no damages, contribution or indemnity shall be recoverable for the portion of the loss or damage caused by the fault or negligence of such owner or driver, and the portion of the loss or damage caused by the fault or negligence of such owner or driver shall be determined, although such owner or driver is not a party to the action.

No doubt the learned trial Judge had present to his mind the provisions of The Negligence Act when he submitted the first five questions to the jury for, using the very words of subsec. (1) of sec. 2, he asked the jury to find first whether there was any negligence on the part of the defendant or its servants which "caused or contributed to" the accident, and then, was there any negligence on the part of Lorne Gives which "caused or contributed to" the accident. He then asked the jury to state the degree of fault or negligence, if they found negligence on the part of both the defendant and Lorne Gives. Having the answers of the jury to these questions, the provisions of The Negligence Act directly apply and govern the liability. If the answers to the first five questions stand, then the loss or damage is to be borne by those whose negligence "caused or contributed" to the accident, and in the proportions fixed by the jury, subject, however, to the provisions of subsec. (2) of sec. 2, in the case of passengers in a motor vehicle.

It is not possible, in my opinion, to hold that the answers to Questions 6, 7, 8 and 9, or any of them, subtract anything from the effect of the answers to the earlier questions. In fact it is plain that the jury did not fully appreciate the import of the later questions, or they would not have found "ultimate" negligence on the part of both the watchman and Lorne Gives.

On the other hand, it was quite within their province to find that both of them were guilty of negligence that "caused or contributed to" the accident.

When questions are put to the jury in terms similar to the first four questions here, no purpose can be served by submitting any question as to "ultimate" negligence. No doubt the jury must be properly instructed as to what negligence comes within the description of "negligence that caused or contributed to the accident." In *McLaughlin v. Long*, [1927] S.C.R. 303, at p. 311, Chief Justice Anglin said: "In our opinion, within the meaning of s. 2 of The Contributory Negligence Act of New Brunswick (1925, ch. 41) damage or loss is 'caused' by the fault of two or more persons only when the fault of each of such persons is a proximate or efficient cause of such damage or loss, *i.e.*, only when at common law each would properly have been held guilty of negligence which contributed to causing the injurious occurrence." The New Brunswick statute provided that "Where by the fault of two or more persons damage or loss is caused to one or more of them, the liability to make good the damage or loss shall be in proportion to the degree in which each person was at fault." The words of the Ontario statute are "caused or contributed to", but I think the rule that the law regards only what is proximate to the injury or damage equally applies. See *Corstar v. The Eurymedon*, [1938] 1 All E.R. 122; *Spaight v. Tedcastle* (1881), 6 App. Cas. 217, at p. 219.

I am not to be understood as saying that it will, in all cases be sufficient to submit questions to the jury in the form of the first four questions submitted here. In the multitude of negligence cases, with their infinite variety of circumstance, there may well be cases where to determine the essential facts it will be necessary to put questions to the jury that are somewhat more refined than the broad questions as to whose negligence and what negligence "caused or contributed to" the loss or damage. That must be left to the good judgment of the trial Judge to deal with when it arises.

Counsel referred us to the cases of *Walker v. Forbes* (1925), 56 O.L.R. 532, and *Farber v. Toronto Transportation Commission*, in the same volume at p. 537. The statute under consideration in these cases was The Contributory Negligence Act of 1924 (14 Geo. V, ch. 32). That statute was repealed, however, in 1930 by 20 Geo. V, ch. 27, sec. 9. As was said in the *Walker*

case, that "statute was passed to get rid of what was believed to be an injustice in depriving an injured party of any relief if he, by his negligence or act, in any way contributed to his injury, no matter how negligent the other party may have been." The scope of the present Negligence Act is much wider, and I think the two cases referred to are not relevant to it.

The appeal should be dismissed with costs.

MASTEN J.A.:—This is an appeal by the defendant from the judgment resulting from the findings of the jury, and asks that the action be dismissed, or in the alternative that a new trial be ordered.

Notwithstanding my view that the appellant has suffered an injustice I am of the opinion that, in the present condition of Canadian jurisprudence, it does not appear warrantable for a Provincial Court of Appeal to criticize any finding by a jury, and I agree that the appeal must be dismissed.

HENDERSON J.A.:—An appeal from the judgment of Mackay J., of April 25th, 1941, after a trial with a jury and a cross-appeal by the respondent.

The learned trial Judge submitted questions to the jury, which were answered as follows:

"(1) Was there any negligence on the part of the defendant or its servants, which caused or contributed to the accident?
A. Yes.

"(2) If so, in what did such negligence consist? A. Watchman late in taking his place on crossing to warn traffic. (This is based on the time the car would take to arrive at the scene of the accident after the watchman first saw it on leaving his shanty).

"(3) Was there any negligence on the part of Lorne Gives which caused or contributed to the accident? A. Yes.

"(4) If so, in what did such negligence consist? A. Lack of precaution. Should have seen train if looking. Boy should not have been standing which prevented clear vision.

"(5) If you find there was negligence on the part of the defendant and Lorne Gives, state the degree of fault or negligence. A. The defendants—20 per cent.; Lorne Gives—80 per cent."

In my opinion there was evidence to support these findings, and they should not be disturbed.

The learned trial Judge, however, submitted these further questions to the jury:

“(6) Notwithstanding negligence (if any) of the defendant, could Lorne Gives have avoided the accident by the exercise of reasonable care on his part? A. Yes.

“(7) If so, how could he have done so? A. By keeping the boy seated so his vision was not interrupted.

“(8) Notwithstanding the negligence (if any) of Lorne Gives, could the defendant have avoided the accident by the exercise of reasonable care on its part? A. Yes.

“(9) If so, how could it have done so? A. Watchman should have been on crossing sooner so as to have had time to have attracted Gives’ attention by waiving his light.”

Then following the assessment of damages in accordance with the above findings.

Questions 6 and 8 appear to have been submitted upon the basis of obtaining a finding of “ultimate negligence”, or what in modern parlance is sometimes called “the last chance”. I am unable to appreciate that the doctrine of ultimate negligence has survived the provisions of The Negligence Act, R.S.O. 1937, ch. 115. It may be conceivable, although not by me, that circumstances could occur in which a casualty primarily caused by the negligence of the defendant could have been avoided by reasonable care on the part of the plaintiff, and that the lack of such reasonable care on the part of the plaintiff could still afford the defendant a last chance which he should reasonably have taken advantage of, to avoid the result of the plaintiff’s want of reasonable care. It is, however, quite inconceivable to me that this could be followed by a last chance afforded to the plaintiff, and so *ad infinitum*. However, in this case, the answers of the jury do not take the matter beyond their findings in their answers to the second and fourth questions, and I therefore think that the questions and answers subsequent to No. 5 should be disregarded.

I agree, therefore, with my Lord, the Chief Justice, that the appeal should be dismissed with costs.

Appeal dismissed with costs.

[MAKINS J.]

McGrogan et al. v. Hertz Drivurself Stations of Ontario.

Motor vehicles—Rented vehicle—Vehicle rented by one person and driven by another—Injuries to guests in vehicle—Liability of owner—Consent—Whether vehicle operated in business of carrying passengers for compensation—The Highway Traffic Act, R.S.O. 1937, ch. 288, sec. 47.

A motor vehicle owned by A. was rented for \$10.00 by B. from A. for a day. B. gave possession of the car to C. who invited some guests to go for a drive with him and while the vehicle was being driven by C. an accident occurred and the guests were injured. The guests brought this action for damages against A., the owner of the motor vehicle, relying upon sec. 47 of The Highway Traffic Act, R.S.O. 1937, ch. 288.*

Held, that the action failed for the following reasons:

- (1) The car was not at the time of the accident being driven by C. with either the express or implied consent of the owner A. and therefore the owner could not be liable under sec. 47(1) of the Act.
- (2) The guests were travelling free and were not paying any compensation either to A. or C. and therefore the action was also barred by sec. 47(2) of the Act; it could not be said that the car was "a vehicle operated in the business of carrying passengers for compensation" within the meaning of the exception contained in sec. 47(2).

AN action to recover damages for personal injuries.

The action was tried by MAKINS J. without a jury at Toronto.

C. A. Thompson, for the plaintiffs.

T. N. Phelan, K.C., for the defendant.

December 4th, 1941. MAKINS J.:—The defendant herein is a firm which rents out cars to people or persons who propose to drive themselves, and on or about the 1st February, 1941, one Iversen, a Norwegian flyer, stationed in Toronto, gave his friend one Gramness, also a Norwegian flyer, \$10.00 and asked him to go to the defendant firm and rent for him a car for the following Sunday. Gramness attended the defendant firm and rented a car in his own name; the interest or existence of Iversen was not disclosed. A contract was signed by Gramness, which is Exhibit 3 in the trial. The manager of the defendant firm ques-

* "47. (1) The owner of a motor vehicle shall be liable for loss or damage sustained by any person by reason of negligence in the operation of such motor vehicle on a highway unless such motor vehicle was without the owner's consent in the possession of some person other than the owner or his chauffeur, and the driver of a motor vehicle not being the owner shall be liable to the same extent as such owner.

(2) Notwithstanding the provisions of subsection 1, the owner or driver of a motor vehicle, other than a vehicle operated in the business of carrying passengers for compensation, shall not be liable for any loss or damage resulting from bodily injury to, or the death of any person being carried in, or upon, or entering, or getting on to, or alighting from such motor vehicle."

tioned Gramness as to his ability to drive and whether or not he was a good driver and held a licence to drive, and it was disclosed that Gramness held a Norwegian licence to drive a car, and was a good driver. Gramness paid down the \$10.00 he had received from Iversen and took possession of the car, which he drove about the city the remainder of the afternoon and then handed the car over to Iversen.

Iversen proposed to make a trip to Niagara Falls on the Sunday morning following, and to accompany him as his guests he invited a girl friend of his, also the boarding house owner, his wife and two daughters of the house in which he boarded. The party started out on Sunday morning; going down the Queen Elizabeth Highway near Grimsby, Iversen pulled to his left to pass another car when he had car trouble either from ice or snow, or for some other reason. He went up on the boulevard and struck a pole. The house owner's wife and daughter were badly injured. The wife was taken to the Toronto General Hospital with a fractured pelvis and a cracked sacrum. The daughter had her left thigh fractured and went to the Sick Children's Hospital. It turned out according to the evidence of Gramness that his friend, Iversen, had no driving qualifications whatever, although the question of his negligence was not gone into on the trial very fully.

The plaintiffs are the husband and wife and daughter who were injured by the accident, and they sue not the driver of the car but the Drivurself firm who originally rented the car to Gramness, maintaining that the case falls within the exception in subsec. (2) of sec. 47 of The Highway Traffic Act, R.S.O. 1937, ch. 288, where it says: "Other than a vehicle operated in the business of carrying passengers for compensation."

No authorities have been cited to me, nor can I find anything that is of much assistance to me in the books, but I am of opinion that the facts in this case do not permit this case to fall within that exception. There seems no doubt but that the exception clause contemplates passengers paying the owner or driver of a taxi or bus or other vehicle for the purpose of delivering them safely at their desired destination.

This car, in my opinion, was not "a vehicle operated in the business of carrying passengers for compensation." These passengers were guests of the driver Iversen, a man who was entirely unknown to the defendant. They were not paying to

the owner or driver compensation. They were travelling free as guest passengers. If these passengers who were hurt were to sue the driver alone, they could not have succeeded because they were not passengers for compensation, and, in my opinion, much less could they succeed against the defendant, the owner, of the car; and they fall within the general provisions of subsec. (2) of the Act rather than within the exception, and that is fatal to their case against the defendant.

The case also falls to be decided under subsec. (1) of the said section. The defendant had not given its consent, either express or implied, to Iversen driving the car, and had no knowledge whatever, as I have before said, of the existence of Iversen. It will be noted that the defendant questioned Gramness as to his ability to drive, treating him as a principal and not as an agent for the purpose of hiring, placing the confidence in him to drive safely and not in someone else.

The contract signed by Gramness on the 1st of February has the condition on the back, among other conditions, "The automobile described on the reverse side hereof shall not be operated (d) by any person other than the renter who signed the rental agreement or his employee."

It was argued by Mr. Thompson that where in a contract such as this such a restriction is contained on the back, it must either be drawn to the attention of the party restricted or placed in such a way on the contract that his mind will be attracted to it, and cites the case of *Spooner v. Starkman*, [1937] O.W.N. 254.

Gramness alleges in his evidence that he had himself on previous occasions rented cars from this firm under a similar contract, and it can be inferred therefore that he was familiar with the terms and conditions of the contract. Moreover, on the face of the contract, above his signature, is the following reference to what is on the back of the contract. "And especially the terms and conditions appearing on the reverse side hereof and which by reference thereto are incorporated herein." So that according to the terms of the main contract on its face his attention is especially directed to the terms and restrictions on the back of the contract. I cannot, therefore, give effect to the *Spooner v. Starkman* case above referred to.

Quite without the contract terms, I am of opinion that there was no implied consent to Iversen driving this car. It was a special personal bargain with Gramness, having reference to

his ability to drive the car. The implication would be quite the other way and to the effect that the defendant would not consent to someone else driving the car other than Gramness or his employee. Iversen was not an employee of Gramness. But the express conditions in the contract puts it beyond doubt. There was, therefore, no consent either express or implied on the part of the defendant to Iversen driving the car. That, again, in my opinion, is fatal to the plaintiffs' case.

A number of cases on the question of the lack of consent have been cited to me, as follows: *Child v. Vancouver*, [1941] D.L.R. 75; *Martel v. Dominion Motors*, [1935] 2 D.L.R. 187, and *Boyd v. Smith*, [1931] O.R. 361, all of which are a help although not closely in point.

In case a Court above may be of different opinion in the matter of liability, I find the damages of the plaintiffs as follows: The plaintiff (the father) paid ambulance, doctors, and hospital expenses, Mr. Thompson says, to the extent of \$381.00. Dr. Thomas of the staff of the Toronto General Hospital was called after that evidence was given and stated that his bill would be about \$50.00. That does not seem to be included in the \$381.00 and should be added to it, making \$431.00, and therefore said plaintiff's damages I fix at that amount.

The plaintiff mother, Blanche McGrogan, who had her pelvis bone fractured and other lesser injuries, made a complete recovery, except that she complains about getting pains in her back when she exerts herself to any extent. For her injury, for pain and suffering, I would fix her damages at \$1,000.00; and Marie McGrogan, the child who had her thigh fractured, and made a complete recovery, I would fix the damages at \$800.00. She says herself that her leg is just as good now as before the accident, and while she had pain and suffering and confinement to bed, it is not as serious a matter as her mother's injury and inability.

Action dismissed with costs if demanded.

Action dismissed with costs.

[COURT OF APPEAL.]

Rex v. Philbrook.

Criminal Law—Murder—Manslaughter—Self-defence—Onus of proof—Misdirection by trial Judge—Reasonable doubt—Acquittal of accused by Court of Appeal—The Criminal Code, R.S.C. 1927, ch. 36, sec. 53.

Where an accused is charged with murder and at the trial the question of justifiable self-defence arises, the burden is not upon the accused to show conclusively that the mode of defending himself was necessary to preserve his life or to avoid serious bodily harm. The Crown must prove the guilt of the accused, but there is no such burden laid on the accused to prove his innocence and it is sufficient for him to raise a doubt as to his guilt; he is not bound to satisfy the jury of his innocence and he is entitled to the benefit of the doubt: *Woolmington v. The Director of Public Prosecutions*, [1935] A.C. 462, and *Mancini v. The Director of Public Prosecutions* (1941), 58 T.L.R. 25, applied.

AN appeal by the accused from his conviction and sentence for manslaughter after trial before Hope J. and a jury at Toronto.

December 15th, 16th and 17th, 1941. The appeal was heard by ROBERTSON C.J.O., MASTEN, FISHER, HENDERSON and GILLANDERS JJ.A.

R. H. Greer, K.C., for the accused, appellant, said that the accused stated the woman directed him to drive his car into a lane which was very dark. He put out the car lights. Immediately he felt a pain in his abdomen. He pulled out the knife which had been thrust in him and plunged it into the woman who was sitting beside him. The accused swore he had never seen the knife before.

Subsequently a knife with blood on it was found 75 feet from where the accused's car was found. The knife would fit into a purse carried by the woman.

The charge of the trial Judge was wrong in law as to self-defence. The doctrine of retaliation has no place in law. The self-defence by the accused is directly within sec. 53 of the Criminal Code.

The counsel for the Crown did not put all the facts before the jury. There was a witness subpoenaed by the Crown whose evidence would have assisted the accused, but this fact was not known to the accused until after his trial. The counsel for the Crown has a responsibility to lay all the facts in his possession before the jury: *Rex v. Merritt*, [1934] O.R. 392; *Rex v. House* (1921), 16 Cr. App. R. 49, at p. 51; *Rex v. Chamandy*,

[1934] O.R. 208, at p. 212; *Rex v. Mandryk*, 72 C.C.C. 84, at p. 87.

The Crown counsel, by an improper line of questioning of witnesses, endeavoured to show that the accused owned the knife. There was no evidence adduced to substantiate the questions of Crown counsel. As the question of the ownership of the knife was a matter of extreme importance, this is sufficient ground for quashing the conviction: *Rex v. Alexander*, 18 Cr. App. R. 139, at p. 140; *Koufis v. The King*, [1941] S.C.R. 481; *Maxwell v. Director of Public Prosecutions*, [1935] A.C. 309; *Woolmington v. Director of Public Prosecutions*, [1935] A.C. 462, at p. 482; *Makin v. Attorney-General for N.S.W.*, [1894] A.C. 57; *Rex v. Ellsom*, 7 Cr. App. R. 4; *Rex v. Prince*, [1941] 3 All E.R. 37.

The trial Judge interrupted the address of the counsel for the accused, leaving the impression with the jury that counsel was not to be relied on for a statement of the law. This was improper and reacted harmfully to the accused.

The trial Judge invited the jury to accept the evidence of the woman's manager, notwithstanding his admitted poor character, on the one point of ownership of the knife. This witness was subpoenaed by the Crown but not called, and the defence being forced to call him, the Crown counsel was able to cross-examine him. The procedure was not in compliance with the standard of conduct of a Crown Prosecutor: *Rex v. Chamandy*, [1934] O.W.N. 153, at p. 155, [1934] O.R. 208, at p. 212.

The duty of the trial Judge in explaining provocation to the jury is properly set out in *Woolmington v. Director of Public Prosecutions*, [1935] A.C. 462, at p. 481.

J. R. Cartwright, K.C., also for the accused, appellant, contended that the trial Judge failed properly to state the theory of the defence to the jury. The defence of self-defence was essentially a matter for the jury to pass upon with the proper direction: *Brooks v. The King*, [1927] S.C.R. 633, at p. 634.

The charge to the jury stressed that the defence of self-defence must be proved to the full satisfaction of the jury, whereas the jury should have been instructed that if they were in reasonable doubt, there must be an acquittal.

The jury were not told that, if they believed the accused's story, which was that upon being struck, the victim of a murderous attack, he struck back in self-defence, he might and

should be acquitted: *Woolmington v. Director of Public Prosecutions*, [1935] A.C. 462, at p. 482; *Rex v. Prince*, [1941] 3 All E.R. 37.

The trial Judge adopted in his charge the remarks of the Crown counsel as to retaliation, and pointed out to the jury they might thereby reduce the conviction to that of manslaughter. Retaliation is not known to the criminal law as provocation upon which a charge of murder may be reduced to manslaughter: *Woolmington v. Director of Public Prosecutions*, [1935] A.C. 462, at p. 482.

The jury were not properly charged with respect to the subject of circumstantial evidence: *Hodge's Case* (1838), 2 Lewin C.C. 227; *Fraser v. The King*, [1936] S.C.R. 1; *Rex v. Comba*, [1938] O.R. 200, *sub nom. The King v. Comba*, [1938] S.C.R. 396.

The ownership of the knife was made a salient point in determining the veracity of the accused. The trial Judge commented on the fairness of the address of the Crown counsel, notwithstanding that the latter stated to the jury his personal belief that the accused owned the knife. This is sufficient to warrant the granting of a new trial.

It is extraordinary to say that if a person is attacked and waits before he strikes back he will be found not guilty, but if he strikes back immediately will be convicted and self-defence will not be a defence. In this case it was impossible for the accused to retreat; he was in an automobile in a narrow dark lane.

The accused is 21, with a good record in the positive sense. He was sentenced on a wrong principle, as the jury's finding was that the accused told the truth.

W. B. Common, K.C., for the Crown (*W. C. Bowman* with him), contended that the jury rejected the theory of self-defence. The act of the accused was not one of self-defence, but of provocation, and therefore the jury reduced the conviction to manslaughter.

Under sec. 53 of the Code, the accused was not entitled to strike back immediately; he must believe, or reasonably apprehend his danger. The reasonable apprehension is a matter of fact upon which the jury must pass: *Rex v. Ogal* (1928), 50 C.C.C. 71.

As to the conduct of Crown counsel in not calling certain witnesses on the preliminary hearing, there is no obligation on the Crown to call all the witnesses at that time.

No injustice was done the accused by the questions put by Crown counsel to witnesses when endeavouring to establish the ownership of the knife. In view of the finding of the jury, they rejected the theory that the knife belonged to the accused. The case of *Rex v. Alexander* (1924), 18 Cr. App. R. 139 has no application, because in the case at bar, the questions were merely concerned with collateral matters to the guilt of the accused.

The case of *Koufis v. The King*, [1941] S.C.R. 481, is not applicable, as in that case Crown counsel improperly cross-examined the accused.

If counsel for the accused states propositions of law in his address, he does so subject to interruption by the trial Judge. It is not ground for a new trial because of interruptions by the trial Judge.

The evidence of the woman's manager was not accepted by the trial Judge, even on the point of the ownership of the knife.

Notwithstanding the criticism of Crown counsel's address to the jury, it is not ground for a new trial: *Rex v. Mouers* (1920), 48 O.L.R. 505, Meredith C.J.O. at p. 513.

It is for the accused to prove self-defence: *Picariello v. The King* (1923), 39 C.C.C. 1, 229, at p. 236; *Rex v. Bottomley* (1922), 16 Cr. App. R. 184, at p. 192.

The trial Judge gave a very extensive preliminary exposition of the law at the commencement of his charge which would dissipate any prejudice to the accused, if such was caused by his later remarks.

There is a difficulty in drawing the distinction between a fight and acting in self-defence. The jury may have decided it was the former. Section 53 of the Code demands some reflection or consideration by the accused: *Rex v. Knock* (1877), 14 Cox C.C. 1.

It was the duty of the trial Judge to outline to the jury the theory of provocation, notwithstanding the defence of self-defence put forward on behalf of the accused, and to instruct the jury fully on every defence that may be available to the accused: *Rex v. Hopper* (1915), 11 Cr. App. R. 136, Lord Chief Justice Reading at p. 140; *Rex v. Silverstone* (1931), 55 C.C.C. 270, at p. 274.

The charge of the trial Judge must be read in its entirety. It will then be seen his exposition of the law on the theory of self-defence was correct.

The expression of personal opinions by the Crown counsel in his summing up did not have any effect on the jury.

Notwithstanding expressions of opinion by the trial Judge, at the same time he repeatedly instructed the jury that all questions of fact were for them to decide. The jury's verdict should not be disturbed: *Rex v. O'Donnell* (1917), 12 Cr. App. R. 219; *Rex v. Duguay* (1933), 59 C.C.C. 328; *Rex v. Moke* (1917), 28 C.C.C. 296.

As to sentence, the Crown has abandoned its cross-appeal for the imposition of a life sentence. The appellant has shown no wrong principle, and mere severity is not sufficient reason for reduction.

J. R. Cartwright, K.C., in reply. The prisoner is not required to satisfy the jury of his innocence: *Woolmington v. Director of Public Prosecutions*, [1935] A.C. 462.

It is submitted no jury could possibly say there was not a reasonable doubt in their minds after hearing the evidence in the case at bar, and after being properly charged on the law by the trial Judge.

Cur. adv. vult.

December 20th, 1941. ROBERTSON C.J.O.:—An appeal from conviction of the appellant and from the sentence imposed at his trial before Hope J. and a jury at Toronto. The appellant was charged with the murder of one Charlotte Ida Adair. The jury found him not guilty of murder but guilty of manslaughter; thereupon a sentence of 12 years' imprisonment was imposed. There was a cross-appeal by the Attorney-General against the sentence, asking that it be increased to life imprisonment, but on the argument the cross-appeal was withdrawn.

In support of the appeal against the conviction counsel relied upon numerous grounds, including the non-disclosure to counsel for the defence of evidence that might have assisted the defence, the alleged improper introduction of irrelevant matters by counsel for the Crown to the prejudice of the prisoner, and to various matters in the address to the jury of counsel for the Crown after the close of the evidence. I do not think it is necessary that I should discuss any of these matters at this time, for the

more serious matters raised for the appellant relate to the charge to the jury of the learned trial Judge, and with some of these I shall deal.

The deceased woman died as the result of being stabbed with a butcher knife. There is no question that the appellant inflicted the wound. He admits it. His defence is that he inflicted the wound in self-defence. He swears that the woman had the knife in her possession. Where it came from he says he does not know. He says that without warning and without cause the woman drove the knife into him and left it imbedded in him; that fearing that he was the victim of a murderous attack, he withdrew the knife from his own body and drove it into hers. His is the only account of what happened. Great importance therefore attached to the question of the burden of proof, and to the view the jury might take of appellant's veracity.

In his charge to the jury the trial Judge, in the early part of his charge, and before entering upon the discussion of the facts of the case, pointed out that an accused person is presumed to be innocent until he is proven guilty, and that the duty of proving his guilt rests upon the Crown, and that the onus never shifts, but that responsibility is always with the Crown through to the very end of the case. He further told the jury that there is also the rule that an accused person is entitled to the benefit of the doubt, that is, that if at the end of the whole case there is a reasonable doubt created by the evidence given by the Crown or by the defence as to whether the accused is guilty or innocent, then the Crown has failed to prove a case against the accused.

No complaint is made as to the way in which the learned trial Judge explained these matters to the jury as general principles in criminal law. It is complained, however, that later there was a grave departure by the learned trial Judge from the general principles that he had laid down. Discussing the law of self-defence, the learned Judge said to the jury:

"I say to you this further in connection with the law of self-defence: the force used by way of self-defence should be proportionate to, and should not exceed, what is necessary to avoid the attack which is being defended, and in order to justify the use of a weapon in self-defence, a person must, if he thereby kills or seriously injures his antagonist, show conclusively (mark this) that the mode of defending himself was really necessary

to preserve his own life or to avoid serious bodily harm, and that before using it he retreated so far as he could, and had no other means left of successfully resisting or escaping.

"I agree with defence counsel that a man when he sees a threat to himself has not got to turn his back and run, but he must retreat so far as he can, and have no other means left to successfully resist or escape, and he must show conclusively that the mode of defending himself was really necessary to preserve his own life."

Towards the close of his charge the learned Judge said:

"If, on the other hand, you think the Crown has failed to prove its case on either count, or that the defence has to your satisfaction proved that this action on his part was necessary in order to save his life, then you may feel that there was such self-defence there as made the killing of the woman excusable, in which event, if you can find that, you will acquit him."

With great respect to the learned trial Judge I am of the opinion that there was serious misdirection in what I have quoted from his charge.

The burden was not upon the accused to show conclusively that the mode of defending himself was necessary to preserve his life or to avoid serious bodily harm, nor any of the other matters set forth in that part of the charge first quoted. It was said by the House of Lords in *Woolmington v. The Director of Public Prosecutions*, [1935] A.C. 462, at p. 481: "Just as there is evidence on behalf of the prosecution so there may be evidence on behalf of the prisoner which may cause a doubt as to his guilt. In either case, he is entitled to the benefit of the doubt. But while the prosecution must prove the guilt of the prisoner, there is no such burden laid on the prisoner to prove his innocence and it is sufficient for him to raise a doubt as to his guilt; he is not bound to satisfy the jury of his innocence." Reference may also be made to *Mancini v. Director of Public Prosecutions* (1941), 68 T.L.R. 25.

The learned trial Judge had in fact earlier in his charge stated the true principle in general terms and in language that suggests quotation from the *Woolmington* case. It was argued for the Crown that taking the charge as a whole it should be held that there was no misdirection of the jury. I do not think the matter can be so regarded. The statement complained of, and which we think should not have been made, dealt directly

with the specific defence relied upon and stated in unequivocal language that to rely upon it the accused must conclusively show certain facts. That is not the law and it is impossible to say that no substantial wrong or miscarriage of justice resulted from the improper direction.

It was further argued for the Crown that in any event the jury had believed the prisoner's account of the occurrence as evidenced by their verdict of acquittal for murder and conviction for manslaughter only. Sec. 53 of the Criminal Code is as follows:

"53. Every one unlawfully assaulted, not having provoked such assault, is justified in repelling force by force, if the force he uses is not meant to cause death or grievous bodily harm, and is no more than is necessary for the purpose of self-defence.

"2. Every one so assaulted is justified, though he causes death or grievous bodily harm, if he causes it under reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally made or with which the assailant pursues his purposes, and if he believes, on reasonable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm.

"3. Provocation within the meaning of this section may be given by blows, words or gestures."

Subsection (2) is more particularly relevant to the facts of this case.

There seems to be no room for doubt that the jury did believe that the knife was the woman's knife, and that she struck first, leaving the knife imbedded in the prisoner's stomach, and that he withdrew the knife and struck the fatal blow. The question then remained: Was the fatal blow delivered by the prisoner under reasonable apprehension of death or grievous bodily harm and believing on reasonable grounds that he could not otherwise preserve himself from death or grievous bodily harm, or did he strike merely because of provocation and by way of retaliation? Counsel for the Crown does not concede that upon this question the jury accepted the evidence of the prisoner, and the misdirection to which reference has been made is just as applicable to this element of the defence as to any other. The prisoner was entitled to an acquittal if, upon all the evidence, there was reasonable doubt whether or not the blow was delivered under reasonable apprehension of death or grievous bodily

harm, and if he believed on reasonable grounds that he could not otherwise preserve himself from death or grievous bodily harm. It was not necessary that he should prove that it was so delivered.

There were a number of other objections to the charge, and it is not to be understood that by refraining from a discussion of them we are of opinion that they are not worthy of consideration. The misdirection already discussed is, however, of such prime importance in this case that upon that ground alone the appeal must be allowed.

The further course to be taken in respect of this case has caused the Court grave concern. As counsel for the Crown admits, the jury has accepted the prisoner's account of what happened. Accepting his account, can it be said that the Crown had established beyond reasonable doubt that the prisoner was not under reasonable apprehension of death or grievous bodily harm and believed on reasonable grounds that he could not otherwise preserve himself from death or grievous bodily harm?

The surrounding circumstances contribute to the view that his statement as to his condition of mind is a true statement. The woman was a stranger to him and he was with her at her solicitation. He had been guided to the spot where he was by the woman. The spot was new to him. It was an absolutely lonely spot, in complete darkness, and the stab which he received was very serious and might have been fatal, and was wholly unexpected. He was in ignorance as to what further might occur, just as he was in ignorance why he had been stabbed. Is it natural that in those circumstances he should have acted on reasonable grounds in fear of grievous bodily harm? Is there not evidence that the jury accepted, to support the statement that he did act on reasonable grounds in fearing further grievous bodily harm? Is there not grave doubt that he acted either by way of retaliation or in consequence of mere provocation? If there is grave doubt as to whether he was moved by either of these latter motives, and if there is reasonable evidence that he may have acted under fear of receiving further grievous bodily harm, then there is on the evidence, at least on the circumstances as they are detailed in the evidence, grave matter of doubt to the benefit of which the accused is entitled. If that is so, then it was the duty of the trial Judge to advise the jury that, if they accepted these facts, which it is admitted they

did accept, on these facts there was reasonable doubt, the benefit of which it was their duty to give to the prisoner.

In this case the substantial issue was not whether the prisoner had committed a crime that clearly was committed by some one. The question was whether or not any crime had been committed, by an act that the prisoner admitted was his. The jury having admittedly accepted his evidence of the occurrence, and there remaining only a question upon which, in our opinion, reasonable doubt necessarily arises if the prisoner's account is accepted, and the jury having been misdirected as to the burden of proof, we have concluded that in these special circumstances it is our duty to refuse to order a new trial and to direct a judgment of acquittal to be entered.

MASTEN J.A.:—I agree and have nothing to add.

HENDERSON J.A.:—I agree.

GILLANDERS J.A.:—I agree.

FISHER J.A.:—I agree with the conclusion reached by my Lord, the Chief Justice, that this appeal must be allowed and the conviction quashed.

I would like to add that in my opinion the fatal blow or stabbing in this case, causing the girl's death, cannot be attributed to passion or anger arising from previous provocation, but to the suddenness of the stab in the appellant's abdomen and the instantaneous instinctive act on the part of the appellant to protect or defend himself from further attack. As all this was done in the dark without the appellant being able to see or note whether a further attack of some kind might be made, clearly what was done was, in my opinion, without criminal intent or *mens rea* or such as to justify a verdict of manslaughter.

Appeal allowed and conviction quashed.

[COURT OF APPEAL.]

Jepsen v. Valley Securities Ltd. et al.

Railways—Negligence—Straying horses—Gates—Liability of owner of land on to which horses had strayed—The Railway Act, R.S.C. 1927, ch. 170, secs. 274, 275, 386 and 406.

The plaintiff's four horses wandered from his farm on to a highway and ultimately to a private lane owned by the defendant Valley Securities Limited. The private lane crossed railway tracks protected by gates which were open when the horses wandered on to the tracks and were killed by a train. The plaintiff brought action against Valley Securities Limited and at the trial the jury found the defendant Valley Securities Company Limited negligent in failing "to enforce closing of railroad gates".

Held, by the Court of Appeal, that the action as against the defendant Valley Securities Limited should be dismissed for the following reasons:

- (1) At common law there was no obligation in the defendant Valley Securities Limited to protect the trespassing horses from injury: *Addie v. Dumbreck*, [1929] A.C. 358.
- (2) Subsec. 1 of sec. 406 of The Railway Act, R.S.C. 1927, ch. 170, provides that "every person who wilfully leaves open any gate on either side of the railway provided for the use of any farm crossing without some person being at or near such gate to prevent animals passing through it on to the railway shall, on summary conviction, be liable to a penalty of \$20.00 for each such offence" and subsec. 3 further provides that "every person guilty of an offence under this section shall, in addition to the penalty and liability therein provided, be liable to pay to any person injured by reason of the commission of such offence all damages thereby sustained". It is a condition precedent to the liability created by subsec. 3 of sec. 406 that the defendant be convicted by a tribunal competent to try it of an offence within the terms of subsec. 1 of sec. 406.

AN appeal by the defendants Valley Securities Co. Ltd. and David McLeod from the judgment of His Honour Judge Cochran, of the County Court of the County of Peel, entered in favour of the plaintiff against the defendant Valley Securities Co. Ltd. for \$395.00 and against the defendant McLeod for \$5.00 on the findings of a jury. The action was dismissed with costs as against the defendant Canadian Pacific Railway Company.

December 3rd and 4th, 1941. The appeal was heard by ROBERTSON C.J.O., MASTEN and FISHER JJ.A.

J. R. Cartwright, K.C., for the appellants, contended that the appellants owed no duty to the respondent to keep the gates closed on their property leading to the farm crossing over the railway right-of-way. The horses belonging to respondent, which came on the lands of the appellants, were trespassers: *Blyth v. Topham* (1608), Cro. Jac. 158, 79 E.R. 139; *Ponting v. Noakes et al.*, [1894] 2 Q.B. 281; *Grand Trunk Railway v.*

Barnett, [1911] A.C. 361; *Addie & Sons Collieries Ltd. v. Dumbreck*, [1929] A.C. 358.

The respondent's horses were unlawfully at large contrary to by-law. This would deprive the respondent of a right to recover even if the appellant was in breach of a statutory duty: *Baldrey v. Fenton* (1914), 6 W.W.R. 1441; *Direct Transport Co. Ltd. v. Cornell*, [1938] O.R. 365.

There was no evidence of the horses being habitually on the land of the appellants.

Under sec. 275 of The Railway Act, R.S.C. 1927, ch. 170, the gates of the farm crossing are to be kept closed when not in use, but this only applies with respect to the owners immediately adjoining the railway right-of-way. The liability imposed under sec. 406 of The Railway Act can only arise after a conviction has been made. Section 275 of The Railway Act does not impose a greater burden on the appellants than the common law. The horses were at large and were trespassers.

A neglect of a statutory duty does not give rise to a right of action in favour of a person suffering damage by reason of such omission unless such right of action be impliedly or expressly given by the statute: *Atkinson v. Newcastle Waterworks Co.* (1877), 2 Ex. D. 441; *Cowley v. Newmarket Local Board*, [1892] A.C. 345; *Municipal Council of Sydney v. Bourke*, [1895] A.C. 433; *Saunders v. The Holborn District Board of Works*, [1895] 1 Q.B. 64; *Groves v. Wimborne (Lord)*, [1898] 2 Q.B. 402; *Johnston and The Toronto Type Foundry Co. Ltd. v. Consumers' Gas Co. of Toronto*, [1898] A.C. 447; *Phillips v. Britannia Hygienic Laundry Co. Ltd.*, [1923] 2 K.B. 832, at p. 840; *Falsetto v. Brown*, [1933] O.R. 645, at p. 656; *Webster v. Gelinas*, [1941] O.W.N. 371; *Direct Transport Co. Ltd. v. Cornell*, [1938] O.R. 362.

Section 406(3) should not be construed as giving a right of action to the plaintiff. That would be a direct interference with property and civil rights and the section would be *ultra vires* of the Dominion Parliament: *Cushing v. Dupuy* (1880), 5 App. Cas. 409; *C.P.R. v. Corp. of the Parish of Notre Dame de Bonsecours*, [1899] A.C. 367; *Attorney-General for Ontario v. Reciprocal Insurers*, [1924] A.C. 328; *Attorney-General for Canada v. Attorney-General for British Columbia*, [1930] A.C. 111; *Attorney-General for British Columbia v. Attorney-General for Canada*, [1937] A.C. 377; *Macdonald v. Riordan* (1899), 8

Que. Q.B. 555, affirmed (1899), 30 S.C.R. 619; *In re Railway Act Amendment Act, 1904* (1905), 36 S.C.R. 136; *Transport Oil Ltd. v. Imperial Oil Ltd. and Cities Service Oil Co. Ltd.*, [1935] O.R. 215; *Gordon v. Imperial Tobacco Sales Co. of Canada Ltd.*, [1939] O.R. 122; *Rice v. Messenger*, [1929] 2 D.L.R. 669; *Dawson v. Muttart* (1941), 15 M.P.R. 451; *Flick v. Brisbin* (1895), 26 O.R. 423.

R. L. Kellock, K.C., for the respondent, contended that the respondent belongs to the class of persons contemplated by sec. 406(3) of The Railway Act. Section 386 of the Act imposes a responsibility on the railway company in favour of any owner of animals injured on the railway tracks. The liability is not restricted. Section 406 uses the word "wilfully" and not "negligently". There is evidence the gates at the crossing were "wilfully" left open: *McSloy v. Smith* (1895), 26 O.R. 508, at p. 511; *McMillan v. Wallace* (1929), 64 O.L.R. 4, at p. 7.

The liability of the Railway Company under sec. 386 exists whether the animals are at large or not.

There is an implied right of action in the respondent, apart from sec. 406(3) of The Railway Act: *Phillips v. Britannia Hygienic Laundry Co.*, [1923] 2 K.B. 832.

Cur. adv. vult.

December 30th, 1941. ROBERTSON C.J.O.:—I agree with Mr. Justice Masten, whose judgment I have had the privilege of reading, that no case was made out by the plaintiff against the appellants. Counsel for the respondent at the opening of his argument disclaimed any right at common law against the appellants. He relied upon the provisions of the Railway Act (R.S.C. 1927, ch. 170).

After referring to sec. 272, which imposes upon the Railway Company the duty to make "farm crossings", and to sec. 274, which requires the Railway Company to erect and maintain fences on each side of the railway with gates at farm crossings, he cited sec. 275, which provides: "The persons for whose use farm crossings are furnished shall keep the gates at each side of the railway closed when not in use."

It was argued that there having been a breach of this section by the appellants, and as a result of it the respondent's horses having got upon the railway, where they were injured, a cause of action arose. The trial Judge, in charging the jury, assumed

that this is the law, but I find difficulty in reaching that opinion. Quite apart from the objection that the Railway Act, in sec. 406, which respondent also relies upon, seems to have provided the remedy to be applied where one is intended, I can find no ground upon which it can be said that the respondent is within the class of persons for whose protection the duty of keeping the gates closed was imposed. Respondent's horses escaped from his premises by reason of his own negligence, as the jury has found. The horses then strayed along the highway upon which respondent's farm fronted, to a cross-road, along which they travelled to the highway in front of appellants' premises. They then travelled some distance along this third highway until they came to appellants' lane, into which they turned and from which they reached the open gate at the railway crossing. Unless it can be said that the duty imposed on appellants was wide enough to extend to the owners of all stray horses that might wander upon their premises, I think it is impossible to include the respondent within it. I can find nothing in the statute to warrant so loose and general an application of sec. 275.

Respondent's counsel also relied upon sec. 406, and particularly subsec. 3 of that section. In connection with it he cited sec. 386, which imposes a very broad responsibility for damages upon a railway company when any horses, sheep, swine or other cattle, whether at large or not, get upon the lands of the company, and by reason thereof damage is caused to or by such animal. The exceptions from the railway's responsibility made by the section were especially called to our attention as throwing light upon the scope of sec. 406.

Sec. 406 provides in subsec. 1 that every person who wilfully leaves open any gate on either side of the railway, provided for the use of any farm crossing, without some person being at or near such gate to prevent animals passing through it on to the railway, shall, on summary conviction, be liable to a penalty of twenty dollars for each offence. Subsec. 2 provides that every such person shall also be liable to the company for any damage to the property of the company, or for which the company may be responsible by reason of any such act or omission. Subsec. 3 of sec. 406 is as follows:

"Every person guilty of any offence under this section shall, in addition to the penalty and liability therein provided, be

liable to pay to any person injured by reason of the commission of such offence all damages thereby sustained."

The liability to pay damages created by this subsection is imposed only upon persons who are guilty of an offence under the section. Without discussing the question whether one in the position of the respondent comes within the description of a "person injured by reason of the commission of such offence", it is, I think, sufficient to say that the appellants have not been found guilty of any offence under the section. In my opinion they cannot be brought within subsec. 3 until they have been found guilty of the offence by a tribunal competent to try them for the offence. But even if it were sufficient that the jury had on this trial found that the appellants had been guilty of such offence, the jury has not so found. The jury found with respect to the appellant McLeod that he was guilty of negligence consisting in "failure to keep gate closed". As to the appellant company the jury found negligence consisting in "failure to enforce closing of railroad gates". There is no finding at all within the terms of subsec. 1 of sec. 406 against either of the appellants. It may be that the liability to pay damages that sec. 406 imposes upon every person who is guilty of an offence within its terms is wide enough to include liability to one in the position of the present respondent, but that question it is not necessary to decide in this case.

MASTEN J.A.:—This is an appeal by the Valley Securities Company Limited and David McLeod from the judgment of the County Court of the County of Peel, dated 8th day of June, 1941, whereby it was adjudged that the respondent Jepsen should recover from the defendant David McLeod, the sum of \$5.00, and from the defendant Valley Securities Company Limited the sum of \$395.00 with costs, and whereby the action as against the Canadian Pacific Railway was dismissed with costs.

The action was tried at great length on the 6th, 7th and 9th days of June last, the charge of the trial Judge rehearsing the evidence very fully and covering 35 foolscap pages of typewriting. Apparently, while the evidence was detailed at length in the Judge's charge, the case appears to have been submitted to the jury as a case of common law negligence, judging by the questions submitted and the answers given, which are as follows:

"Q. 1. Was there any negligence on the part of the defendant, Canadian Pacific Railway Company, which caused or contributed to the accident? A. No.

"Q. 2. If your answer to Question 1 is 'Yes', in what did such negligence consist? No answer.

"Q. 3. Was there any negligence on the part of the defendant David McLeod which caused or contributed to the accident? A. Yes.

"Q. 4. If your answer to Question 3 is 'Yes', in what did such negligence consist? A. Failure to keep gate closed.

"Q. 5. Was there any negligence on the part of the defendant Valley Securities Company, which caused or contributed to the accident? A. Yes.

"Q. 6. If your answer to Question 5 is 'Yes', in what did such negligence consist? A. Failure to enforce closing of railroad gates.

"Q. 7. Was there any negligence on the part of the plaintiff, Svend Jepsen, which caused or contributed to the accident? A. Yes.

"Q. 8. If your answer to Question 7 is 'Yes', in what did such negligence consist? A. Not proper protection to keep horses in barnyard and on own farm.

"Q. 9. At what amount do you assess the total damages to the plaintiff? A. \$500.00.

"Q. 10. If you find the plaintiff and the defendants guilty of negligence, in what degree do you apportion the blame? A. Plaintiff, 20 per cent.; defendant, Canadian Pacific Railway, 0; defendant, David McLeod, 1 per cent.; defendant, Valley Securities, 79 per cent."

Judgment was reserved by the learned trial Judge and subsequently announced without reasons.

The action is for damages arising out of the killing of four horses owned by the respondent Jepsen. As it appears from the evidence and from the answers of the jury, these horses, which were in the barnyard of the plaintiff, wandered out of the barnyard on to the highway, and ultimately through a private lane on the farm of the appellant, Valley Securities Company Limited, which lane crossed the railway tracks of the Canadian Pacific Railway at a level crossing. The entrance to the railway was protected by gates, which admittedly were open at the

time when the horses wandered from the appellant's lane to the right-of-way of the Railway.

The uncontradicted evidence is that the snow was very deep in this locality at the time when the occurrences in question took place. The entrance from the farm yard of the respondent to the highway was protected by bars. The uncontradicted evidence appears to show that the snow was of sufficient depth that the lower bar was covered, also that the upper bar was down, so that the horses had only the middle bar to cross over, and its height above the snow was not sufficient to restrain them. This situation would appear to have arisen from the negligence of the respondent, and I assume that it is in consequence of this negligence on his part that the jury found him guilty of contributory negligence to the extent of twenty per cent.

I have been unable to understand how or why the appellant McLeod is charged with only one per cent. of the loss, and the Valley Securities Company Limited is charged with seventy-nine per cent. McLeod was the servant of his co-appellant, Valley Securities Company Limited, and was in charge of their farm on which the land and the railway gates in question were located. If there was any liability it would appear that the owner of the farm is only liable in consequence of the default or negligence of its servant, for whom it is responsible, and that the claim against each of them should be the same. However, this is perhaps immaterial in view of the conclusion at which I have arrived.

It is settled law that there is no obligation on the part of the owner of premises to protect a trespasser from injury. I refer to the admirable statement of the law by Lord Hailsham in *Addie v. Dumbreck*, [1929] A.C. 358, at 365:

"Towards the trespasser the occupier has no duty to take reasonable care for his protection or even to protect him from concealed danger. The trespasser comes on to the premises at his own risk. An occupier is in such a case liable only where the injury is due to some wilful act involving something more than the absence of reasonable care. There must be some act done with the deliberate intention of doing harm to the trespasser, or at least some act done with reckless disregard of the presence of the trespasser."

That makes it plain that as the horses were trespassing on the appellants' property, the appellants owed no duty to them

at common law. But on the argument before this Court the basis of liability was founded on The Railway Act, R.S.C. 1927, ch. 170, secs. 274, 275, 386 and 406. Section 274 provides that the Company shall erect and maintain upon the crossing "(b) swing gates on such fences at farm crossing of the minimum height aforesaid (4' 6'') with proper hinges and fastenings." Section 275 provides that the persons for whose use farm crossings are furnished shall keep the gates on each side of the railway closed when not in use. Section 386 provides that persons suffering damage to their animals while on the lands of the Company shall be entitled to recover the amount of such damage against the Company unless the Railway establishes that such damage was caused by reason of the gates not being kept closed by any person for whose use any farm crossing is furnished. It was under this clause that the Railway Act was relieved of liability. Section 406 provides, among other things, as follows: "S. 1. Every person who (a) wilfully leaves open any gate on either side of the railway, provided for the use of any farm crossing, without some person being at or near such gate to prevent animals passing through it on to the railway, shall, on summary conviction, be liable to a penalty of \$20.00 for each such offence; S. (3) Every person guilty of any offence under this section shall, in addition to the penalty and liability therein provided, be liable to pay to any person injured by reason of the commission of such offence, all damages thereby sustained."

Section 406 of the Railway Act is the first of a group of sections relating to the "Safety and Care of Roadway, etc." as appears by its heading. To that end the section invokes the aid and sanction of the criminal law and makes a breach of its provisions a criminal offence punishable under subsec. 1 by a fine.

Subsection 3 of 406 then proceeds to create a liability adjunctory and supplementary to the fine, which liability is enforceable against "every person guilty of any offence under this section."

There must, therefore, exist as a condition precedent to the liability created by subsec. 3 an "offence" founded on this section and ascertained in the manner therein provided and not otherwise.

The instant action is brought as a plain simple civil action for negligence, and in the absence of any "offence" ascertained in the manner required by the statute, it can derive no support

from the provisions of sec. 406, applicable as those provisions are solely to a criminal offence when found pursuant to its provisions.

If I am right in the view above expressed, this action lies neither at common law nor under the provisions of sec. 406, and I prefer to refrain from discussing the grave questions of difficulty that seem to me to arise in any further proceedings by the plaintiff.

I would allow the appeal and dismiss the action with costs, without expressing any opinion whatever regarding the liability of the defendants if a proceeding is brought under sec. 406.

FISHER J.A. agreed with MASTEN J.A.

Appeal allowed with costs.

[COURT OF APPEAL.]

Coates et al. v. Toronto, St. Catharines Transport Ltd. et al.

Negligence—Motor vehicles—Duty of operator of motor vehicle before turning to left to first see that movement can be made in safety—Extent of such duty towards vehicles approaching from rear—Duty of operator of motor vehicle overtaking another vehicle to sound horn—The Highway Traffic Act, R.S.O. 1937, ch. 288, secs. 15(3) and 39(1)(d).

Although the blowing of the horn by the operator of a motor vehicle before attempting to pass another motor vehicle going in the same direction is not specifically required by statute, sec. 15(3) of The Highway Traffic Act, R.S.O. 1937, ch. 288, requires that it shall be "sounded whenever it shall be reasonably necessary to notify pedestrians or others" of the approach of the vehicle. In the present case where the forward vehicle was pursuing a somewhat erratic course it was held that it was reasonably necessary for the operator of the approaching vehicle to sound his horn and that his failure to do so was negligence contributing to the accident.

However there is also a duty on the operator of the forward vehicle under sec. 39(1)(d) of The Highway Traffic Act before turning to the left from a direct line to see first that such movement can be made in safety and, if the operation of the vehicle approaching from the rear may be affected by such movement, to give a signal plainly visible to the operator of the approaching vehicle of the intention to make such movement.

Hence where both operators failed to perform their respective duties the degrees of fault were apportioned between them.

AN appeal by the defendants from a judgment of His Honour Judge Lazier, of the County Court of the County of Wentworth, after the trial of the action by him without a jury.

October 8th, 1941. The appeal was heard by ROBERTSON C.J.O., MASTEN and HENDERSON JJ.A.

J. J. Bench, K.C., for the defendants, appellants.

R. L. Kellock, K.C., for the plaintiff, respondent.

October 21st, 1941. ROBERTSON C.J.O.:—An appeal from the judgment of Judge Lazier of the County Court of the County of Wentworth, dated 21st June, 1941, after the trial of the action by him without a jury.

The action arose from a motor accident that occurred in the afternoon of 1st May, 1941, on the highway running from Niagara Falls to Hamilton. The accident took place in front of the nursery of E. D. Smith & Sons Limited at Winona. The respondent, Wilmott Coates, had business at the nursery. He had finished his business at the Company's office, which is towards the east side of its premises, and had come out on the highway to go to another part of the Company's premises which is approached through a driveway opening into the south side of the highway some 400 feet to the west. Respondent was

driving a small truck known as a panel-body truck, and his wife was riding in the truck with him. The appellant Richards was at the same time driving a heavily loaded motor-truck of the appellant Transport Company in the same direction. He was a considerable distance to the east of the respondents when they came out on the highway and turned west, but he overtook them and endeavoured to pass them on the left-hand side, just as respondents approached the place where they intended to turn to the left into the nursery driveway. The accident happened at this time. Some part of appellants' truck was in collision with the left side of respondents' truck, and the question is where does the fault lie. The learned trial Judge found appellants 70 per cent. responsible and respondents 30 per cent.

There is, of course, conflicting evidence, and the findings of fact of the learned trial Judge are important. He found that respondents had started to make their turn to the left when they were struck, although the respondent driver says they had not. He further finds that the respondent driver did not comply with sec. 39, subsec. 1(d) of the Highway Traffic Act (R.S.O. 1937, ch. 288). This subsection is as follows:

"The driver or operator of a vehicle upon a highway before turning to the left from a direct line shall first see that such movement can be made in safety, and if the operation of any other vehicle may be affected by such movement shall give a signal plainly visible to the driver or operator of such other vehicle of the intention to make such movement."

In this connection the learned trial Judge says of the respondent driver, "He should have satisfied himself that there was no car behind him. There was a car and if he had had a sufficient rear-vision mirror he could have seen it. The driveway which he intended to enter was not marked, and the driver following had no reason to expect that he would turn into it, although Richards (appellants' driver) says that after the plaintiff had turned towards the centre and turned back again, he was suspicious of him and was watching him closely."

The respondent driver swore that as he approached the place where he intended to turn he held out his left hand as a signal of his intention. The appellant driver disputes this. The trial Judge made no express finding on the matter. It may be that his finding that the driver following had no reason to expect that respondents would turn indicates that he had concluded

that the respondent driver had not given any signal of his intention to turn to the left into the driveway. In any event he has not found either for the respondents or against the appellants on that question.

With respect to warning given by the appellant driver that he intended to pass, the finding of the learned trial Judge is as follows: "Although he says he blew his horn, both the plaintiffs say they did not hear it and it cannot be found as a fact that he did blow his horn."

Much was said in evidence and in argument about the speed of appellants' truck, but the learned trial Judge says nothing about it. Whatever may have been the speed of appellants' truck as it overtook the respondents, it seems plain that it had slowed down before the attempt was made to pass, and I think the learned trial Judge was right in not regarding speed as an element in the accident.

Commenting on the appellants' position the learned trial Judge said, "When he (appellants' driver) saw the plaintiff, as he says, pulling to the right and then pulling back again, he was put on inquiry, and it must also be remembered that the onus is on the car following in case of an accident or collision to show it was not his fault. He took the risk of passing this car." This appears to be the basis upon which the trial Judge concluded that "the greater negligence was that of the defendant."

Accepting the findings of fact of the learned trial Judge as to the acts and omissions of both drivers, as I think we are bound to do, I find myself unable to concur in his conclusion as to the apportionment of fault. Appellants' driver had before him the left side of the road clear. He had ample room in which to pass, and he would have passed respondents' car safely if the respondents' driver had not suddenly turned to the left in front of him. This the respondent driver did without warning when appellants' truck was in the very act of passing him. He turned on to the left side of the road without seeing whether or not that movement could be made in safety, and his act made the collision inevitable. His was, beyond doubt, negligence causing the accident. But for the prompt action of appellants' driver in turning into the ditch, for which the trial Judge commends him, much graver consequences would have followed it.

With respect to the failure of appellants' driver to blow his horn, which is the only act of negligence found against him, while

the blowing of the horn before attempting to pass another motor vehicle going in the same direction is not specifically required by statute, sec. 15, subsec. 3 of The Highway Traffic Act requires that it shall be "sounded whenever it shall be reasonably necessary to notify pedestrians or others" of the approach of the vehicle. The fact that appellants' driver says that he sounded his horn may be taken as some evidence that this was an occasion when it was "reasonably necessary" to give notice of his approach. In any event there was the somewhat erratic course of the respondent driver by which the learned trial Judge says appellants' driver "was put on enquiry", when he noticed it. The respondents tell a different story, but the trial Judge seems to have accepted appellants' account of the movements of respondents' car immediately before the attempt to pass, and in the result it has told against the appellants rather than to their advantage.

While accepting the findings of fact of the learned trial Judge and his conclusion that there was some negligence on the part of both drivers, I am of the opinion that the greater fault was with respondent driver. With respect, I am of opinion that the statement of the trial Judge that "the onus is on the car following in case of an accident or collision to show it was not his fault" requires some qualification, at least in the circumstances of this case.

When it is established, as it is here, that the driver of the car ahead has turned to the left into the path of the car that is passing, and has neglected his statutory duty to see first that the movement can be made in safety, the onus, in my opinion, is then upon the driver of the car that is ahead. It was his act that directly brought about a collision and made it unavoidable. The most that can be said of the failure of appellants' driver to sound the horn is that he might have aroused the respondent driver to a sense of his duty to look. But that duty to look did not arise from nor depend upon the prior sounding of the horn. There is an imperative duty on a driver when about to turn to the left to see that it is safe to turn to the left. The neglect of this duty by the respondent driver was the direct cause of the accident. The failure to sound the horn was, at most, only a contributory factor. I would reverse the degrees of fault assigned to the respective drivers by the trial Judge, and would apportion 70 per cent. to the respondent driver and 30 per cent.

to the appellants', and would vary the judgment accordingly. Respondents' costs of the action should be on the County Court scale, and appellants' costs of counterclaim also on the County Court scale. The appellants should have their costs of the appeal. Costs should be set off and, as between the respondent driver and appellants, damages should also be set off.

MASTEN J.A.:—This is an appeal from the judgment of His Honour Judge Lazier sitting without a jury in the County Court of the County of Wentworth. The judgment is dated June 21, 1941.

The action arises out of a collision between motor vehicles both of which were going west. The collision was in the nature of what is sometimes called a "sideswipe" and it occurred while the appellant was attempting to pass the respondent. The trial Judge does not make an explicit finding as to where, with respect to the centre line of the street, the plaintiffs' vehicle was at the moment of collision. The evidence of the male plaintiff (the driver) is that he was hugging the centre line of the road but had not yet begun to turn. The female plaintiff thinks the left-hand turn had begun, and the trial Judge points out that the respondent could have been struck as he was only if he had started to make a left turn.

At page 11 of the evidence the respondent's deposition is as follows:

"Q. When the impact occurred where would your car be in relation to the white line? A. Well, I would say it was on the white line.

"Q. Was any of it beyond the white line, to the south? A. It may have been a little to the left, it may have been, but I would say on the white line.

"Q. That would be to the south of the white line? A. Right.

"Q. Do you mean all of the car, or some portion of it? A. I hadn't started to make my turn so I would say my four wheels would be about on the white line, they might have been a little over to the south.

"Q. That is, to the left of your road? A. Right.

"Q. What portion of your truck was hit? A. The rear end."

My conclusion from a study of all the evidence is that at the moment of impact the respondents' vehicle was slightly south of the line and had just begun to make a left turn, but I think it

was not far over the line and that the left turn was only beginning and was not a sharp turn as stated by the appellants.

In dealing with the questions submitted on this appeal, subsec. 3 of sec. 15 of The Highway Traffic Act becomes of importance. It reads as follows:

"15. (3) Every motor vehicle, bicycle and tricycle shall be equipped with an alarm bell, gong or horn, and the same shall be kept in good working order and sounded whenever it shall be reasonably necessary to notify pedestrians or others of its approach."

I agree with my Lord that, in the circumstances here existing, it was "reasonably necessary" that the appellant should blow his horn. The facts creating that necessity are that the respondents' driver had been driving his car from side to side on the road in such a manner as to excite the suspicions of the appellants' driver and to make him suspicious of respondents' movements so that he was watching him, also the fact that he was slowing down from the speed of 20 to 25 miles at which he had been going.

The trial Judge finds that although the appellants' driver says he blew his horn, both the respondents say they did not hear it, and he states that it cannot be found as a fact that the appellants' driver did blow his horn. As it has been already determined that the circumstances are such that the statute made it necessary for appellants' driver to blow his horn before attempting to pass, it follows that the onus was on him to establish that he complied with the statute. But according to the Judge's finding, appellant failed to prove that he did blow his horn and, consequently, failed to satisfy the onus that the statute imposed on him.

Not only so, but while I entirely agree that the duty resting on the respondent is as stated by my Lord the Chief Justice, I am equally of opinion that *prima facie* and subject to special circumstances an even heavier obligation rested on the appellant to make sure before attempting to pass the respondents' vehicle that he could safely do so. The appellants' driver was the actor, attempting to pass. If there was a risk he was the man creating it. Not only so, but instead of relying, as the respondent was obliged to do, on the reflection from a small and shifting mirror he had direct vision at all times of the car he was passing. While both parties are under an obligation to exercise great

care, yet, in my view, the duty resting on the appellant in the circumstances here existing was somewhat heavier than that resting on the respondent.

Dealing with the facts, could there be any doubt but that if the appellant had adequately sounded his horn the respondents would have heard it and refrained from an attempt to make a left-hand turn?

While I cannot agree with the apportionment of negligence found by the trial Judge, and while as a trial Judge I might have made an apportionment different from that now suggested by my Lord, I am, after conference with the other members of the Court, content to concur in the apportionment suggested by my Lord and also in his disposition of the costs.

HENDERSON J.A.:—An appeal from the judgment of his Honour Judge Lazier, of the County Court of the County of Wentworth of the 21st June, 1941.

The circumstances under which the collision occurred are stated in the reasons for judgment of the learned trial Judge. Accepting as I do his findings of fact, I am, with respect, unable to agree with his conclusions. I agree with the learned County Judge that the plaintiff driver was negligent, but I am of opinion his negligence was the cause of the collision. There is no definite finding against the defendant's driver. The plaintiffs say they did not hear his horn. The defendant's driver says he blew it and the learned trial Judge says he is unable to find that he did. My view is that the defendant's driver was not called on to blow his horn. The relevant provisions of the statute are in sec. 15, and the provision to which I call attention is in subsec. 3, as follows:

"(3) Every motor vehicle, bicycle and tricycle shall be equipped with an alarm bell, gong or horn, and the same shall be kept in good working order and sounded whenever it shall be necessary to notify pedestrians or others of its approach."

The plaintiff driver gave no indication of an intention to make a left-hand turn. He was not approaching an intersection and the lane into which he ultimately attempted to turn was hidden. He veered to the centre of the highway and then veered back to the right-hand side. The tractor and trailer of the defendant was alongside the plaintiff's truck when, without

warning, the plaintiff driver started a left-hand turn. His truck was struck on its left side by the trailer, and not by the tractor.

The learned trial Judge says:

"I would like to note that while Richards, the defendant driver, has been found negligent I think he acted with great promptitude and decision when he drove his tractor into the ditch, thereby avoiding what might have been a more serious accident."

With this I agree, but I also think it is quite evident that but for the prompt action of the defendant's driver in taking to the ditch, a much more serious accident was bound to occur and probably his action saved the plaintiff's lives, having regard to the weight of the tractor and trailer, and the load it was carrying.

The whole circumstances indicate, in my opinion, bad driving on the part of the plaintiff driver, and good driving on the part of the defendant's driver.

For these reasons I would allow the appeal with costs, and I would dismiss the plaintiffs' action with costs, and allow the defendants' counterclaim with costs.

Appeal allowed in part by varying the degrees of fault found by the trial Judge. HENDERSON J.A., who would allow the appeal and dismiss the action, dissenting.

[COURT OF APPEAL.]

Fremont Canning Company et al. v. Wall et al.

Johnson v. Wall et al.

Companies—Right of president to preside at meetings of shareholders—Right of president who is authorized by Board of Directors to act as general manager to receive salary for the performance of his duties as general manager—By-law providing that no shareholder can act as director unless he is holder of one share of Class B stock—Eligibility of persons who are not holders of shares of Class B stock to be elected to Board of Directors—Declaratory judgments—The Judicature Act, R.S.O. 1937, ch. 100, sec. 15(b).

The Court has a wide discretionary power under sec. 15(b) of The Judicature Act, R.S.O. 1937, ch. 100, to grant a declaratory judgment, but such jurisdiction is to be exercised with caution. Hence, the Court declined to grant a declaratory judgment where all the persons who would be affected by the declaratory judgment were not parties to the action, and where the plaintiffs sought declarations in their favour upon matters of minor importance while they withheld from determination in the action the real question of substance upon which any importance the minor matters might have depended.

Save insofar as the duty and power of a president of a company incorporated under The Companies Act (Dominion) is subject to some express limitation in the charter or in the by-laws, it is the duty and right of the president to preside at all meetings of the company. It may be that, if the president should so conduct himself as chairman as to prevent the shareholders transacting the proper business of the meeting in a lawful manner, the majority of shareholders present may oust him and appoint another chairman in his place, but in the present case no question of this kind arose.

Where a by-law of a company incorporated under The Companies Act (Dominion) provides that no shareholder shall be qualified to act as a director unless he is a holder of one share of the Class B stock of the company, a person who is not the holder of one share of the Class B stock is not eligible for election to the Board of Directors.

The Companies Act (Dominion) does not contain any provision corresponding to sec. 92 of The Companies Act (Ontario), R.S.O. 1937, ch. 47, which provides that "no by-law for the payment of the president or of any director shall be valid or acted upon unless passed at a general meeting or if passed by the directors until the same has been confirmed at a general meeting." Hence, where the president of a company incorporated under The Companies Act (Dominion) was employed by the directors as general manager of the company pursuant to a pre-incorporation agreement, and where the action of the directors was subsequently confirmed at a shareholders meeting it was held that the president was entitled to recover his agreed salary for the performance of his duties as general manager. In any event, sec. 92 of The Companies Act (Ontario) does not require the sanction by the shareholders of payments to a president for services rendered apart from those which it was his duty as president to perform: *Crawford v. Fullerton* (1919), 59 S.C.R. 314, and *Hood v. Caldwell*, [1923] S.C.R. 488, applied.

THE two actions were tried together. The facts are fully stated in the reasons for judgment of Rose C.J.H.C.

The actions were tried by ROSE C.J.H.C., without a jury, at Toronto.

Glyn Osler, K.C., and *R. H. Sankey*, K.C., for the plaintiffs.

W. N. Tilley, K.C., and *C. F. H. Carson*, K.C., for the defendant Wall.

No one appeared for the defendant *Fine Foods of Canada Ltd.* against which pleadings had been noted closed.

August 20th, 1940. ROSE C.J.H.C.:—These actions were at the instance of counsel tried together. In the first, there are raised again the principal questions which upon the originating notice in *Re Fine Foods of Canada Ltd.*, [1939] O.R. 401, Gillanders J.A. found it impossible to decide upon that motion. The second raises a different question.

Before 1931 the defendant, Wall, had for many years taken a prominent part in the canning industry in Canada. He had managed a company known as Quality Cannery of Canada Limited and had been president and general manager of Associated Quality Cannery Limited, which had taken over the business of the first mentioned and other canners, and then had sold his interest in Associated Quality Cannery Limited to the Whittall Company of Montreal. Minnesota Valley Canning Company, a Minnesota corporation, of which Mr. E. D. Cosgrove is president, does a very large business in the canning of peas and corn, and in 1929 and 1930 it developed a market in Canada for two of its products. But a change made in the Canadian customs tariff in 1930 made it desirable that this company should have a plant in Canada, and Mr. Cosgrove approached Mr. Wall about what the latter calls a partnership. Negotiations followed and a tentative agreement was reached and was set out in a letter from Mr. Cosgrove (writing in the name of his company) to Mr. Wall dated March 13, 1931, looking to the formation of a Canadian company of which the working capital should be contributed in equal shares by the Minnesota company and Mr. Wall. This tentative agreement ripened into a formal agreement dated April 1, 1931, between the Minnesota company and Mr. Wall, of which there is an abstract in the judgment of Gillanders J.A. in [1939] O.R. 401, which abstract it is unnecessary to set out here, although it seems to be desirable to set out certain clauses in full. Clause 3 is, in part, as follows:

"3. The corporation and Wall shall each subscribe, immediately on incorporation and organization of the Canadian company, and by these presents do subscribe, for one thousand

(1,000) shares of the preferred stock of the Canadian company, at a price of \$100,000, and shall furnish the Canadian company equal amounts on account of such subscriptions as and when required by the Canadian company for the construction and equipping of a plant and for working capital until each has paid the Canadian company the full sum of \$100,000."

Clause 4 reads: "4. It is contemplated by the term of this agreement that the Canadian company will require additional capital from time to time through the sale of its preferred stock, and the parties hereto mutually agree that they will subscribe for such additional preferred stock on the same basis and for the same price as set forth in paragraph 3 thereof." By clause 5 it was agreed that the Canadian company should be caused to enter into an operating agreement with the Minnesota company in a form set out, and that the Minnesota company should by an agreement in a form set out assign trade-mark and other rights to the Canadian company; and by clause 6 it was agreed that upon execution of the agreements provided for in clause 5 the parties would cause the Canadian company to allot and issue to the Minnesota company or its nominees 6,000 shares of Class A stock, the full 100 shares of the Class B stock, and 3 shares of Class A stock for each share of preferred stock sold by the Canadian company over and above the 2,000 shares which the Minnesota company and Wall were to take up; and by clause 7 the Minnesota company agreed to transfer to Wall 2,400 shares out of the 6,000 Class A shares, 50 shares of the Class B stock, and 40 per cent. of any additional Class A stock issued to the Minnesota company pursuant to clause 6. By clause 8 Wall agreed that in consideration of the Minnesota company's covenant to transfer shares to him, he would accept the position of manager of the Canadian company and would devote his entire time and attention to managing that company for five years, at a salary of \$10,000 for the first year, \$12,500 for the second year, \$15,000 for the third year, "and such salary for the fourth and fifth years as the Board of Directors (of the Canadian company) shall determine, provided that it shall not, in any event, be less than \$15,000. Such salary shall be paid by the Canadian company monthly."

Clauses 9 and 10, the effect of which was stated shortly by Gillanders J.A., are as follows:

"9. The parties hereto further agree one with the other to vote their respective holdings of B stock so as to cause the number of directors of the Canadian company to be limited to six, and to deprive the presiding director of a second or casting vote, to provide that four directors shall constitute a quorum for the transaction of business, and that no act or resolution of the Board of Directors shall be valid or binding on the company unless such act or resolution is that of at least four directors. It is further understood and agreed between the parties that Wall shall have a right at all times to nominate three of said directors, of whom one shall be president of the company and the corporation shall have the right to nominate the other three, of whom one shall be chairman of the Board of Directors, and that each will cause his stock to be voted to elect the nominees of the other. Each agree further with the other that he will not for a period of twenty years vote his stock in such manner as to change the provisions and agreements outlined in this paragraph."

"10. Each party covenants with the other that he will not for a period of twenty years from the date hereof dispose of, or assign, his Class B shares to any one whomsoever without the consent of the other."

Wall had been willing originally to agree to accept the position of general manager for three years, as mentioned in the letter of March 13, 1931; but at the instance of Mr. Cosgrove he extended the time to the five years provided for in the formal agreement.

The Canadian company was formed and the letters patent dated April 8, 1931, contain the provisions quoted by Gillanders J.A. that the holders of the preference shares "shall not have any right of voting at any meeting of the shareholders of the company, nor shall such preference shares qualify any person to be a director of the company; provided, however, that if the company shall default in the payment of dividends for two successive years, the holders of such preference shares shall thereupon acquire the right of voting at all meetings of shareholders of the company, every holder of preference shares being entitled to one vote for each \$100 of capital paid up thereon", such right of voting to cease when all accrued dividends upon the preference shares have been paid, and to revive from time to time whenever

the company makes default in payment of dividends for two successive years; that the "Class A no par value shares shall have no voting rights"; and that the "Class B no par value shares shall enjoy, subject to the provisions as to voting rights respecting preference shares, the sole voting rights with respect to all matters pertaining to the company and the management thereof, including election of directors". No dividends have ever been paid on the preferred stock.

The company adopted such by-laws as were provided for in the agreement, amongst them Nos. 6, 7, and 9, quoted in the judgment of Gillanders J.A. And the company entered into the contracts with the Minnesota company provided for in the agreement. The Minnesota company granted to the Canadian company the full support of its executive, scientific and administrative staff in supervising the development and maintenance of the properties of the Canadian company, the production of seeds, and the use of certain brands; and the Canadian company gave the Minnesota company the exclusive right to direct the production, planting, harvesting, canning and labelling of certain products. Directors were elected, those nominated by the Minnesota company being Mr. Cosgrove, Mr. W. H. Patton, and Mr. George F. Winter, each of whom was qualified by the transfer by the Minnesota company into his name of one Class B share; and Mr. Wall's nominees being himself, Mr. James E. Wall and Mr. Leo. Page, each of whom was qualified by the transfer to him of one of Mr. Wall's Class B shares. Mr. Patton is an officer—president, I think it was said—of Central Wisconsin Canneries, Inc. This company is a subsidiary of, or at least very closely affiliated with, the Minnesota company, Mr. Cosgrove being its vice-president. It holds 500 of the preference shares and 1,000 of the Class A shares of the defendant company which it acquired by transfer from the Minnesota company in 1931.

Mr. Wall was elected president and Mr. Cosgrove was elected chairman of the board of directors of the defendant company. By By-law No. 17 it was enacted that the chairman of the board should preside at all meetings of the board; should exercise general supervision over the finances of the company; and should possess and might exercise such powers and fulfil such duties as the board might from time to time by resolution direct. Subject to these powers of the chairman of the board, it was enacted

by By-law No. 18 that "The president shall have the general charge and control of the business and affairs of the company, and of the work and management of the property thereof, and may make and enter into all contracts necessary or proper for the transaction of the business of the company." Mr. Wall was appointed general manager by an agreement, dated April 13, 1931, and running for five years from April 8, 1931. The agreement provides that during the term he shall "devote the whole of his time, attention, and abilities to the business of the company, and shall obey the orders from time to time of the board of directors of the company, and in all respects conform to and comply with the directions and regulations given and made by them, and shall well and faithfully serve the company and use his utmost endeavours to promote the interests thereof." The salary was the salary stipulated in the agreement between the Minnesota company and Wall, and was to commence from April 8, 1931, and be paid monthly on the first day of each month during the term of the employment (whether in advance or for the preceding month's work is not stated.)

The business for which the Canadian company had been formed proceeded, and in 1932 Mr. Wall proposed to Mr. Cosgrove that the company should begin the manufacture of "strained" peas. Cosgrove gave Wall a letter of introduction to Mr. Frank Gerber, the president of the plaintiff company, which is a Michigan corporation and a very large manufacturer of "strained" foods. Gerber and Wall had discussions, Gerber coming to Ontario and inspecting the defendant company's plant at Tecumseh, and being given to read a copy of the agreement of April 1, 1931, between the Minnesota company and Wall. Then followed some correspondence between Gerber and Wall, Gerber at first failing quite to understand the financial structure of the Canadian company and Wall explaining, and some correspondence between Gerber and Cosgrove, with the result that an agreement was made between the plaintiff company and the defendant company dated September 26, 1932, by which the plaintiff company agreed to subscribe for and purchase 250 shares of the preferred stock of the defendant company at par, and to subscribe for and purchase an additional 250 shares when the growth of the business of the defendant company "on the products which (were) the subject matter of the contract" should

necessitate additional capital investment; this obligation to take additional shares being conditional, however, upon a like subscription by the Minnesota company. By the agreement the plaintiff company assigned to the defendant company its goodwill in Canada, Great Britain, Ireland, and all other British possessions, including certain trade marks, and the defendant company agreed to pay a certain royalty. The plaintiff company was to supervise and control the packing of products by the defendant company under the trade marks; and the defendant company was not to sell under the trade marks any products which the plaintiff company should deem to be of inferior quality.

Before the making of the agreement just mentioned the Minnesota company and Wall, pursuant to the terms of their original agreement, each subscribed for 250 shares of the defendant company's preferred stock additional to the original 2,000 shares. The Minnesota company had paid for the shares for which it had so subscribed, but Wall had paid only some \$500 and had given his note for the balance, which note the defendant company had discounted, and only five shares had actually been issued to him, although the others had been allotted; and the method adopted of providing the plaintiff company with its 250 preferred shares was to let it take over Wall's position as regards the 250 for which he had subscribed. Gerber had, of course, stipulated for some Class A shares and these were provided by the Minnesota company and Wall.

When the transaction had been completed the Minnesota company pursuant to an understanding of all concerned—Cosgrove, Wall and Gerber—caused a transfer to be made to Gerber of the one Class B share theretofore held by Mr. Winter, and Gerber was, as the Minnesota company's nominee, elected to the board of the defendant company on April 24, 1933, since which time the board has consisted of Messrs. Cosgrove, Patton and Gerber, nominees of the Minnesota company, and John Wall, James E. Wall, and Page, John Wall's nominee.

After the plaintiff company had for some time been the holder of shares of the stock of the defendant company, additional money was needed and the plaintiff company and the Minnesota company each took and paid for another 250 of the preferred shares.

Another company that must be mentioned is the Empire Foods Corporation Limited. The Continental Can Company, an

American corporation, bought out the Whittall Company of Montreal, and thus acquired the stock of Associated Cannery Limited, acting as I understand it, through Continental Can Company of Canada Limited, a Canadian subsidiary of the American company. The Continental company, which was a manufacturer of containers, did not desire to carry on the business of canning, and so asked Wall to look over the factories of the canning companies which it had acquired and to report. Wall made his report in or about January, 1936, and the outcome was an arrangement that a new company which, when formed, was called Empire Foods Corporation Limited, should be formed to take over these canning companies from the Continental Can Company, and that the management of the new company (i.e., the Empire Company) should be undertaken by the defendant company, Fine Foods of Canada Limited. Apparently an essential matter in these negotiations was that the Empire Company should have the benefit of management by Wall. The arrangements were carried through, the Fine Foods of Canada Limited and Empire Foods Corporation Limited entering into the requisite licensing and operating agreements, and on February 22, 1936, an agreement was entered into between the Minnesota company, Fine Foods of Canada Limited, and the Empire Company, whereby the Minnesota company consented to these operating and licensing agreements and made certain stipulations as to the manner in which Empire Foods Corporation Limited should conduct its business. By the agreement between Fine Foods of Canada Limited and Empire Foods Corporation Limited, the Empire Company had to provide a certain portion of the salary paid by Fine Foods of Canada Limited to Wall. Thereafter Wall did manage the Empire Company, and the Empire Company did contribute a portion of his salary, until the Empire Company was wound up at the instance of the Whittall Company at some time between the issue of the writs in these actions and the trial.

Although there were, from time to time, some differences of opinion, Cosgrove and Gerber seem to have been content with Wall's management of the defendant company and the Empire Company until about the end of 1938. After the expiry of the term of the agreement by which Wall was appointed general manager of the defendant company, there was no formal agreement for his continuing in the management; but at the beginning

of each financial year the directors of Fine Foods of Canada Limited adopted a budget which provided for his salary for the year at the minimum rate for the fourth and fifth years under the contract, which salary was not increased, it having been arranged by Wall with Cosgrove and the Continental Company that his salary for managing the two companies should be the same as it had been for managing the one, and that for his extra work he should content himself with the profits from some common stock of the Empire Company which was to be allotted to him. Then Cosgrove, saying that the Continental Company was dissatisfied, suggested that if Wall would resign he, Cosgrove, would see that he was made chairman of the board of the defendant company at a salary of \$6,000 a year with no duties except the duty of attending meetings. This offer Wall said he would not consider unless his interests were bought out. Some negotiations then ensued and it looked as if an agreement had been reached by which Wall was to purchase the shares of the Minnesota company and others, but these fell through and the matter stood in that way until the time for the holding of the annual meeting of the shareholders of the defendant company on April 19, 1939.

At the meeting Wall took the chair and called the meeting to order, and Gerber moved that Cosgrove act as chairman. Wall rules, as the minutes say, "that the motion was out of order, and refused to put it to a vote because it was the prerogative of the president of the company to act as chairman at meetings of shareholders. He offered to adjourn the meeting to enable a competent legal opinion to be obtained by the company or to enable a ruling to be made by the Courts, but this offer was not accepted." A few days before the meeting the plaintiff Johnson had transferred, out of 20 preference shares owned by him, one share each to Messrs. Borden, Sankey, Torry, Baldwin, Hessian, Scott, Felton, and Dietrich, to enable them to attend and vote at the meeting. The transferees, as is admitted, had no beneficial interest in the shares represented by the certificates issued to them. Some of them took part in the discussion ensuing upon the chairman's ruling that the motion that Mr. Cosgrove act as chairman was out of order. After that motion had been ruled out of order certain routine business was conducted, including the preparation by scrutineers of a list of the shareholders

present in person or by proxy, and a discussion of the financial statement and the comments of the auditors, and then the meeting proceeded to the nomination of directors, and Mr. Gerber, seconded by Mr. Sankey, nominated Messrs. John Wall, Patton, Cosgrove, Gerber, Dietrich, and Felton. The chairman ruled that the nomination of Messrs. Dietrich and Felton was out of order because they were not holders of Class B shares. They are in fact officers of the Minnesota company. Objection was taken to this ruling, and Mr. Sankey moved that the decision of the chairman be appealed to the meeting. The chairman refused to put this motion to the meeting as being contrary to the by-laws and out of order. Then, after some further discussion, there was a motion to adjourn, and Mr. Borden professed to appeal to the meeting "for a vote by the show of hands as to whether the six directors nominated by Mr. Gerber are to be elected directors of the company". The chairman ruled that Mr. Borden was out of order because there was before the meeting a motion to adjourn. Mr. Borden said that twelve shareholders out of eighteen present had by a show of hands "voted in favour of those nominees". The chairman put the motion to adjourn, which apparently was carried.

In the first action, which is brought by the Fremont Canning Company and Johnson in their own names and not professedly on behalf of all shareholders, the plaintiffs claim: (a) an order declaring that the action of Wall in refusing to accept or submit to the meeting Gerber's motion that Cosgrove take the chair was wrongful and illegal; (b) an order declaring that the refusal to accept the nomination of Dietrich and Felton was wrongful and illegal; (c) a declaration that the six nominated were qualified to be elected and are in fact the directors of the defendant company; (d) an injunction restraining Wall at any continuation of the meeting or at any other meeting of the shareholders from refusing to submit a motion that another shareholder take the chair, and from refusing to accept the nomination as directors of officers or directors of a company which is the holder of Class B shares; and (e), (f), (g), and (h) other relief, including, as an alternative relief, an order that the continuation of the meeting be conducted under the supervision of the Court, or an order giving directions for the conduct of the continuation of the meeting.

In the second action, Johnson, professing to sue on behalf of himself and all shareholders other than Wall, claims in his statement of claim: (a) a declaration that Wall is not entitled to be paid for any salary, allowances, fees, or emoluments, and an injunction restraining him from accepting, and the defendant company from paying, any such salary, allowances, fees, or emoluments; (b) an accounting for all money paid by the defendant company to Wall for salary or otherwise, since the determination of his service contract (*i.e.*, since April 8, 1936); (c) damages against Wall for wrongfully taking or accepting moneys from the company without the authority of the board; and other relief.

In my opinion Mr. Wall's ruling on the motion that Mr. Cosgrove take the chair was correct.

No judgment that is really conclusive of this question was cited by counsel. It is a question which would not arise in England in the case of a company to which The Companies Act, 1929, applies; because by schedule 1, table A, clauses 47 and 48, it is provided that the chairman, if any, of the board of directors shall preside as chairman at every general meeting of the company, and that if there is no such chairman, or if at any meeting he is not present within fifteen minutes after the time appointed for holding the meeting, or is unwilling to act as chairman, the members present shall choose some one of their number to be chairman. And it is not likely to arise in the case of a company to which The Companies Act, R.S.O. 1937, ch. 251, applies; for sec. 8 provides that the president shall preside as chairman of every general meeting of the company, and if there is no president or vice-president, or if at any meeting neither of them is present within fifteen minutes after the time appointed for holding the meeting, the shareholders present shall choose one of their number to be chairman. And in the cases that have been cited, while they establish the fact that, if the president is unwilling or unable to preside, the members present at a meeting may select a chairman, there is nothing that I have discovered that is at all conclusive as to what the rights of the meeting may be in case a majority of those present desire to have some one act as chairman instead of the president who is present and willing to act. For instance, in *James De-Wolf Spurr v. The Albert Mining Company* (1874), 15 N.B.

Rep. 261, Ritchie C.J. said that when the president, having been nominated and voted in as chairman of the meeting, refused to put any question to the meeting, or to allow anything to be done thereat that might be construed into a violation of a certain by-law, "it was the undoubted right of the meeting by vote to remove him from the chair, and to nominate and appoint a chairman who would properly preside over the meeting and allow the stockholders to exercise their rights under the law." But nothing was decided as to the right to remove a chairman who was willing to preside. My own opinion on the point coincides with the statement in Thompson, Commentaries on the Law of Corporations, (1895) vol. 5, p. 3444, that "The president of a private corporation is, as the term, implies, the presiding officer of its board of directors, and of its stockholders when convened in general meeting". That statement is carried into the article on corporations in 10 Cyc., written by Judge Thompson, at p. 903, and is quoted with approval in *Ex p. Rickey* (1909), 31 S.C. Nevada, 82, at p. 99. In the 2nd edition of Thompson on Private Corporations (written by Mr. Joseph W. Thompson) it is said in vol. 2, p. 487, that "The president of a corporation, strictly speaking, is only the president of the board of directors. The stockholders as such have no officers. However, the president of the board of directors is frequently, by virtue of the by-laws, made the presiding officer at stockholders' meetings; and often, by virtue of his position as president of the board, he is either called to preside, or naturally assumes the position of presiding officer. But in the absence of any by-law or other authority, it is neither his duty nor power to preside at stockholders' meetings, unless selected or elected for that particular purpose. In strict legal contemplation his duties are limited to presiding at meetings of the board of directors." See also 14 C.J. 895. But, in my opinion, the statement in the second edition of Thompson cannot apply in the case of Fine Foods of Canada Limited, whose by-laws require the election by the directors of both a chairman of the board and a president, and provide that the chairman of the board shall preside at all meetings of the board, and that the president shall have the general charge and control of the business and affairs of the company. The affairs of the company are by the statute (sec. 84) to be "managed" by the board; but when it comes to a

meeting of the company at which some individual must preside, I think that the president, who by the by-law had the general charge and control of the business of the company, and whose title indicates that he is the person to preside, has the right to preside.

It is my opinion also that the chairman's ruling as to the lack of qualification of Messrs. Dietrich and Felton was correct.

At common law the members of a corporation could entrust the direction of its affairs to any person or persons whom they saw fit to select, whether such persons were or were not members. But from early times in Canada this right of the members has by statute been restricted in the case of corporations governed by the Companies Acts. It is unnecessary, I think, to set out the statutes, beginning with (1859), C.S.C., ch. 63, which were reviewed by counsel. It suffices to begin with R.S.C. 1927, ch. 27, sec. 103(1), by which it was enacted that "no person shall be elected as a director or appointed as a director to fill any vacancy unless he is a shareholder, owning stock absolutely in his own right, and to the amount required by the by-laws of the company, and not in arrear in respect of any call thereon." Before the incorporation of Fine Foods of Canada Limited, the Revised Statute of 1927 had been replaced by ch. 9, sec. 28, of the statutes of 1930. By that time difficulty had been experienced in the case of companies which had corporations as shareholders; and this difficulty was in part removed by the Act of 1930, by changing sec. 103(1) and making it read: "No person shall be elected as a director or appointed as a director to fill any vacancy unless he, or a corporation of which he is an officer or director, is a shareholder, and, if the by-laws of the company so provide, owning shares of the company absolutely in his own right to an amount required by the by-laws of the company, and not in arrears in respect of any calls thereon." That is to say, it was now possible for the company to have as directors persons who, while not themselves shareholders, were officers or directors of a company which was a shareholder. Why it was necessary to go on to say that, if the by-laws of the company so provided, the person to be elected must own shares of the company absolutely *in his own right*, I do not know; but this latter part of the section has given rise to much discussion in the present case, counsel for the plaintiffs putting it forward as

implying a considerable limitation upon the powers of the company to establish by by-law the qualification to be possessed by a person who is to fill the office of director.

In 1934, three years after the by-laws of Fine Foods of Canada Limited had been passed, there was a new statement of the law in The Companies Act, 1934 (24-25 Geo. V, ch. 33), sec. 86. The relevant parts of that section are as follows: "86. (1) Subject to the provisions of subsection two of this section no person shall be elected as a director of a company or appointed as a director to fill any vacancy unless, he or any other company of which he is an officer or director, is a shareholder, and, if the by-laws of the company so provide, owning shares of the company absolutely in his own right or in the right of such other company to an amount required by the by-laws of the company and not in arrears in respect of any calls thereon. (2) Any person holding shares, not in arrears in respect of any call, as executor, administrator, tutor, curator, committee, guardian or trustee of a testator, intestate, minor, ward, lunatic or interdicted person, or *cestui que trust* may be elected or appointed a director and where any such director ceases to hold shares in trust he shall thereupon cease to be a director and when any other company holds such shares in trust as aforesaid any officer or officers of such other company may be elected or appointed as a director or directors and when such other company ceases to hold such shares in trust any officer so elected shall thereupon cease to be a director."

Counsel for the plaintiffs do not question the validity of the provision in the letters patent that preference shares shall not qualify any person to be a director of the company, but they contend that, as a result of the legislation, by-law No. 6 which, to repeat, provides that "no shareholder shall be qualified to act as a director unless he is the holder of one share of the Class B no par value stock of the company", is to be treated as invalid, or, alternatively, is to be read as if it enacted that no shareholder shall be qualified to act as a director unless he, or a company of which he is an officer or director, is a holder of one Class B share; see clause (d) of the prayer in the Fremont Canning Company's statement of claim. They suggest, in the case of the defendant company, that when by reason of the company's continued default in the payment of dividends the holders of

preference shares acquired the right to vote at meetings of shareholders, they acquired also the qualification to be elected, and, if elected, to serve, as directors; or, at the least, that, notwithstanding the form of the by-law, every holder of a preference share who was an officer or director of a corporation which was the holder of Class B shares acquired the requisite qualification for election to the board; and they carry this latter contention so far as to say that even if a corporation holds only one Class B share all its officers and directors are qualified, so that, if so decided at the meeting at which the election of directors takes place, the board may be constituted entirely of officers or directors of that corporate holder of one Class B share.

In my opinion, neither of the contentions just mentioned is sound. The statute, whether you look at sec. 86 of the Act of 1934 or sec. 103 of the Act of 1930, does not say that every person who is the holder of the requisite number of shares, or who is an officer or director of a company which is the holder of the requisite number of shares, shall be qualified to be a director. All that it does is to decree that, no matter what by-laws may be passed, and no matter what the members of the company may desire, no person shall be a director unless he, or a company of which he is an officer or director, holds the required number of shares; and in this statutory restriction of the right of the company to elect whom it sees fit as directors, I can find no express or implied restriction of the right of a company to say that its directors must be chosen from amongst those shareholders who possess certain prescribed qualifications. It is true that coupled with the enactment that a director, or a corporation of which he is an officer or director, must be shareholder there is in the Act of 1930 a declaration of the right of the company to decree that the director must be a shareholder in his own right, and in the Act of 1934 a declaration of the right of the company to decree that the director or the corporation of which he is an officer or director must be a shareholder in his or its own right. But in 1930, when the statutory requirement that every director must be a shareholder in his own right was being dropped, it may have been—probably it was—deemed expedient to make it plain that the dropping of the statutory requirement did not mean that the company was to be powerless to insist upon the director's possessing the qualification

which theretofore the statute had demanded. But even if that is not the real reason for the inclusion in the Act of 1930 of the declaration of the company's power in this particular, and for the carrying of the same declaration, in its amended form, into the Act of 1934, it is my opinion that no reasonable application of the *expressio unius* rule can lead to a holding that this declaration of the company's right to insist upon this one qualification destroyed the company's inherent right to prescribe its directors' qualifications. In the face of the declaration in the letters patent that preference shares shall not qualify any person to be a director, I think that a by-law of the defendant company which professed to make the holding of such shares a sufficient qualification would be invalid; but I think that, subject to that restriction, the company is free to enact by by-law that anyone who is himself a shareholder or who is an officer or director of a shareholding corporation shall be qualified for election or appointment as a director. However, the company has not seen fit to go as far as it could go if it saw fit. It has not provided for the election or appointment of the directors or officers of corporate shareholders as such. On the contrary, it has enacted that no one shall be qualified unless *he* is the holder of one Class B share. Neither Mr. Dietrich nor Mr. Felton held such a share, and in my opinion neither of them was qualified for election.

The foregoing, of course, has nothing to do with the interpretation of sec. 86(2) of the Act of 1934, which deals with the case of persons holding shares in trust, and which may have to be construed some day, but not in this case.

Johnson sues to compel repayment of all salary paid to Wall after the expiry of the term of the agreement of April 13, 1931, and for an injunction restraining him from accepting, and the company from paying, any such salary. But at the trial counsel for the plaintiffs abandoned all claim to recover moneys paid as part of the salary provided for by the company's operating budgets, the last of which budgets provided for the salary for the fiscal year ending on March 31, 1939; and even if it can be taken to be proved, although the proof is of the slimmest character, that before the issue of the writ on May 16, 1939, Wall had received any salary not provided for by the last operating budget, I think the action for the recovery of the small sum so

received must fail as being an action which Johnson has no right to maintain.

An action for the recovery of moneys paid by a company for services rendered is one which normally ought to be brought by the company. Whether Fine Foods of Canada Limited could have succeeded in an action to recover moneys paid by itself to Wall for services rendered by him after the expiry of the period provided for by the 1938 budget, is, to say the least of it, very doubtful. Certainly, in my opinion, the company could not have succeeded in such an action in respect of so much of the money paid as had been furnished by the Empire Company for the purpose or had been collected by the plaintiff company from the Empire Company; and as regards Fine Foods of Canada's own money so paid (and not repaid by the Empire Company), see *Canadian Credit Men's Trust Association Limited v. Reaume*, [1931] O.R. 398. Wall was in fact general manager. The term for which originally he had been appointed had expired, but his services had continued and he was still in office at the time of the issue of the writ; and the services which, as general manager, he was performing were not such services as only a director can perform. What notice would have been required to deprive him of the office so held, or, if he had been dismissed, what remuneration he would have been entitled to insist upon for the time between the period provided for by the budget and the date of his dismissal, need not be decided; but he had continued to perform the services and had been paid (if, in fact, before the writ there was a payment not covered by the budget), and I think, as I have said, that it is at least very doubtful whether the company could have succeeded in an action to recover that money. But, however that may be, the fact is that the company is not suing and that Johnson is endeavouring in the name of himself and the other shareholders to enforce the company's right. Now, in our practice, in certain circumstances, when a company declines to enforce its right, a shareholder, suing on behalf of himself and the other shareholders and making the company a defendant, can enforce the right for the benefit of the company; but he cannot do so unless the company has been asked to proceed and has not done so. In the present case, Johnson's solicitors had on April 25, 1939, written to the company demanding that the company take immediate action in

the Supreme Court against Wall, claiming a declaration that Wall was not entitled to be paid any salary and an injunction restraining him from accepting any salary, and also "an accounting for the amount of all moneys paid by your company to the said John Wall whether as salary, allowance, fees or emoluments, or otherwise, since his service contract as general manager of your company expired, and judgment for the amount found due." The company had taken no action upon that demand, except that Messrs. Tilley, Thomson and Parmenter, who in the action are acting for Wall, had written to the plaintiffs' solicitors to say in their opinion there was "no possible ground for an action of the kind indicated." But this demand of April 25, made, so far as appears, before any money not provided for by the budgets had been paid to Wall, is a demand that the company sue for an accounting of all moneys paid to Wall since the expiration of his "service contract". It could not succeed as to moneys provided for by the budgets, and unless money for which the budgets did not provide had been paid, it could not possibly succeed at all. So that even if it can be taken to be established that on May 1st money that had not been provided for in the budget was paid, there has been no demand upon the company to sue for the recovery of that money. I think, therefore, that even if some money has been paid for which, in an action properly constituted, judgment could be recovered, no demand upon the company to sue for the recovery of that money has been proved, and that the action cannot be maintained by Johnson.

The foregoing is a strict application of the rule, but, in my opinion, strictness is required in this case. *Prima facie*, Wall has a right to the performance by the Minnesota company of the agreement of April 1, 1931—as against Cosgrove and the Minnesota company a legal right, as against Gerber and the Fremont company, if not a legal right, at least a moral right; and the real matter in controversy is whether the Minnesota company is bound to assist Wall to maintain that equality of representation upon the board for which the agreement provides. If the Minnesota company sees fit to perform its agreement that equality can be maintained, for the Minnesota company and Wall together own more than half of the issued shares of the preferred stock and the whole of the Class B stock. But the

Minnesota company, the Fremont company, and the Central Wisconsin Canneries (through their proxy, Mr. Patton) combined at the meeting to disturb that equality of representation, and thus the very basis upon which Wall and his associates invested a large sum of money in the defendant company; and in this action (the expense of which they are sharing in certain agreed proportions) they have persisted in that attempt; but they have done nothing, either by making the Minnesota company a plaintiff, or by putting Cosgrove or Gerber into the witness box, or otherwise, to put forward any justification for their attempt to destroy the foundation upon which the company was built up, or to make it possible for the Court to determine whether the agreement of April, 1931, ought to be observed. On the contrary, they have deliberately endeavoured, by raising only some questions which would settle themselves if once the real issue were settled, to achieve the purpose of putting an end to the agreement of 1931 without giving Wall an opportunity of endeavouring to uphold it. In those circumstances, my opinion is that, while the Court must enforce for the plaintiffs any rights to which as a matter of strict law they are entitled, the Court must not render any assistance which as a matter of strict law it is not bound to render. Therefore, my opinion is that there ought to be no glossing over of the difficulties that there are in Johnson's way in maintaining his action; and if I had thought that either of Wall's rulings attacked in the Fremont company's action had been erroneous, I should have thought it my duty to consider very carefully the question whether the rulings were on a matter of internal management of the company in which the Court ought not to interfere, and whether the right to vote for the election of a particular nominee (duly qualified) was one of those personal rights of property which can be enforced in an action, or whether on the other hand, the refusal to receive the nomination was a wrong done to the nominee (or the company of which he is an officer or director), rather than a wrong done to the person who made the nomination. Coming to the conclusion to which I have come as to the correctness of the chairman's rulings, I think it is unnecessary, and, perhaps, undesirable, to express any opinion upon those and similar points; but I repeat that I think it is obligatory to scrutinize very carefully Johnson's contention that he has a right to maintain his action.

If Johnson has no right to maintain the action for the recovery of the money paid, certainly he has no right to an injunction; for there is no evidence at all that before April 25, 1939 (the date of the demand), or even before May 16, 1939 (the date of the writ), Wall had threatened thereafter to accept, or the company had threatened thereafter to pay, any unauthorized salary.

For these reasons both actions will be dismissed with costs.

The plaintiffs appealed to the Court of Appeal from the judgments of Rose C.J.H.C.

The appeals were heard by ROBERTSON C.J.O., MASTEN and GILLANDERS JJ.A.

Glyn Osler, K.C., and *R. H. Sankey*, K.C., for the plaintiffs, appellants.

W. N. Tilley, K.C., and *C. F. H. Carson*, K.C., for the defendant Wall, respondent.

April 8th, 1941. ROBERTSON C.J.O.:—The appeals in these actions are from the judgment of Rose C.J.H.C. of 25th September, 1940, by which he dismissed both actions.

The two actions were tried together, and the two appeals were argued together. The questions raised and the relief sought in the two actions are quite different, but they have to some extent a common background.

The facts in relation to the formation of Fine Foods of Canada Limited and its later development are set forth in the judgment of Rose C.J.H.C. In the beginning, in April, 1931, certain arrangements were entered into between the respondent Wall and Minnesota Valley Canning Company, who joined in organizing the Company, providing for their co-operation as shareholders in the election of directors, and in some other matters of consequence in the carrying on of the Company's affairs. This agreement, so far as appears, is still in force and binding, according to its terms, on the parties to it. One of the terms of this arrangement was that these parties should so vote their Class "B" stock as to cause the number of directors to be limited to six, and to deprive the presiding director of a casting vote, to provide that four directors should constitute a quorum and that no act or resolution of the Board should be valid or binding unless it was that of at least four directors. It was also agreed

that each of the two parties to the agreement should have the right at all times to nominate three of the directors, and that each of them would cause his stock to be voted to elect the nominees of the other. It was also a term of this agreement that Wall should accept the office of manager of the Company for a period of five years from its incorporation, at a fixed salary, and when the Company was organized a formal agreement was made between the Company and Wall for his employment as general manager for five years. After the expiry of the five years he was continued as general manager and a salary paid him as before without any express re-appointment by the Board of Directors, and no action has ever been taken by the Board to end his employment.

The only shares that on the organization of the Company carried a present right to vote at shareholders' meetings were the Class "B" shares, of which there were only 100 authorized by the letters patent. The by-laws of the Company provided that no shareholder should be qualified to act as a director unless he was the holder of one share of Class "B" stock. After providing the 6 Class "B" shares necessary to qualify the directors the remaining 94 Class "B" shares were divided equally between Wall and the Minnesota Company, and by the terms of the agreement between them each of them agreed that, for the period of twenty years, he would not dispose of or assign his Class "B" shares to anyone whomsoever without the consent of the other.

By the Letters Patent it was provided that the preference shares should not qualify any person to be a director of the Company, nor had the holders of preference shares any right of voting at any meeting of shareholders, provided, however, that if the Company should make default in the payment of dividends for two successive years, the holders of the preference shares thereupon acquired the right of voting at shareholders' meetings, which right of voting they retained until all accrued dividends had been paid. As the Company never paid any dividends on the preference shares, the holders of these shares became in due time entitled to vote.

The by-laws of the Company contain the necessary provisions to make them conform to the preliminary agreement above referred to between Wall and the Minnesota Company, and in

each year down to the year 1939 three nominees of each of these parties were duly elected to constitute the Board of Directors. In the year following the organization of the Company, on an issue of further shares by the Company, the appellant, Fremont Canning Company, became the holder of certain of the preference shares, and one Gerber, President of the Fremont Company, was elected a director of the Company as one of the three nominees of the Minnesota Company. Neither of these events disturbed the effectiveness of the agreement between Wall and the Minnesota Company, for control of the Company. Wall and the Minnesota Company between them always held, and still continue to hold, more than one-half of the issued preference shares, and of the Class "B" shares they held 95 out of the total of 100 shares, Wall holding one of the director's qualifying shares.

Matters stood in this position when the annual meeting of shareholders was held on 19th April, 1939. I have not gone into the history that lies behind the making of the agreement between Wall and the Minnesota Company for control of the Company, although there were valid and weighty reasons for making it. The validity of the agreement has not been attacked and the observance of its provisions is of great moment, at least to Wall.

At the shareholders' annual meeting on the 19th April, 1939, the respondent Wall, as president of the Company, took the chair and called the meeting to order. Mr. Gerber, who has been heretofore mentioned, moved that Mr. Cosgrove, President of the Minnesota Company, and one of its nominees on the Board of Directors and Chairman of the Board, act as chairman of the meeting. Mr. Wall ruled the motion out of order on the ground that as President of the Company he had the right and duty to act as Chairman of a shareholders' meeting. His action in this regard is attacked in the first-named action. The statement of claim in that action claims the following declaration in respect of it:

(a) an order declaring that the action of the defendant Wall in refusing to accept or to submit to the said annual meeting of the shareholders of the defendant company the nomination and motion respectively of the holder of the proxy for the plaintiff company, whereby E. B. Cosgrove, a shareholder of the defen-

dant company, present at the meeting, was nominated as chairman thereof, was wrongful and illegal.

The only other matter raised in the first-named action also arises from the proceedings at the same meeting of shareholders. When, in due course, the business of electing directors for the ensuing year was reached Mr. Gerber nominated for election as directors the following six persons:—John Wall, Ward H. Patton, W. F. Dietrich, L. E. Felton, E. B. Cosgrove and Frank Gerber. Two members of the retiring Board of Directors, James E. Wall and Mr. Page, who had been elected on Wall's nomination in 1938, were omitted in Gerber's nomination, and there were substituted for them W. F. Dietrich and L. E. Felton, both of whom are officers and directors of the Minnesota Company. Gerber, Cosgrove and Patton were the three nominees of the Minnesota Company on the retiring Board. Cosgrove and Patton are directors of the Minnesota Company and Cosgrove is its President. The election of a Board as nominated by Gerber would therefore place the Minnesota Company in control.

Wall, as Chairman of the meeting, ruled the nomination of Dietrich and Felton out of order on the ground that they were not the holders of Class "B" shares. The only holders of Class "B" shares other than Wall and his nominees, James E. Wall and Page, are the Minnesota Company, Cosgrove, Patton and Gerber, and, as already stated, by the agreement between Wall and the Minnesota Company, neither of them could transfer any Class "B" shares without the other's consent. The Chairman ruled, in the course of discussion, that the fact that a person was an officer or director of a company which was the registered holder of Class "B" shares, did not qualify him to be a director, and he refused to submit to the meeting a motion by way of appeal from his ruling.

In respect of Wall's rulings in this connection, the statement of claim asks the following declarations:

(b) an order declaring that the action of the defendant Wall in refusing to accept the nomination for the office of director of Messrs. W. F. Dietrich and L. E. Felton was wrongful and illegal;

(c) an order declaring that the 6 persons, namely, John Wall, Ward H. Patton, W. F. Dietrich, L. E. Felton, E. G. Cosgrove and Frank Gerber, nominated at the said meeting, were properly

qualified to be elected and to act as directors of the defendant company and/or that the said six persons are in fact the directors of the defendant company.

The statement of claim also asked the following further relief:

(d) an injunction restraining the defendant Wall from refusing to submit to the shareholders at the continuation of the said meeting or at any other meeting of the shareholders of the defendant company a motion, if made, that another shareholder take the chair, and from refusing to accept the nomination as directors of the defendant company of officers or directors of a company which is the holder of Class "B" shares in the capital stock of the defendant company, and for an interim injunction for the aforesaid purposes;

(e) an order compelling the defendant Wall to permit the shareholders present or represented at any continuation of the said meeting or at any subsequent meeting to choose their own chairman and/or an order directing that the continuation of the said meeting be conducted under the supervision of this Honourable Court;

(f) an order giving directions for the conduct of the continuation of the said meeting;

(g) the costs of this action;

(h) such further or other remedy or relief as this Honourable Court may deem meet.

In my opinion none of the declarations asked is a "declaration of right" within the meaning of sec. 15(b) of The Judicature Act. I am further of opinion that even if the Court has jurisdiction to make them the declarations asked for ought not to be made.

The first declaration claimed relates to Wall's action on Gerber's motion that Cosgrove be chairman of the shareholders' meeting, and the Court is asked to declare that Wall's action was wrongful and illegal. By par. 19 of its statement of facts and law, intended to be argued on this appeal, the action of Wall is alleged to have infringed the rights of appellants in this way, "By depriving them of their right to vote on the nomination of the chairman of the meeting." It is not the right of Wall, as president, to preside that is put forward as the right in respect of which a declaration is asked. Neither is it the right of the shareholders as a whole to elect a chairman. It

is too plain that no declaration of right in respect of either of these matters could be made in an action brought by appellants suing on their own behalf, and appellants are driven to put their case on other grounds. Wall's action was not, however, a denial of appellants' right to vote. It was not a question of who could vote and who could not vote. Nor was the ruling in any way personal to appellants. If all the shareholders had voted for another chairman, it would have made no difference, if Wall, as president, had the right to be chairman. Moreover, I think a claim for a declaration of right under sec. 15(b) of The Judicature Act must state what right is to be declared, and a declaration that certain action by the chairman of the meeting was wrongful and illegal is not in the proper sense a declaration of right, even if, to make it, it is necessary, incidentally, to decide some right.

Similar observations apply to the other declarations of right claimed in the first-named action. In appellants' statement of fact and law it is said that the action of Wall infringed the rights of appellants "by depriving them of their right to vote on the election of two persons who were nominated and who were duly qualified." There is the added difficulty that if anyone's right is affected it is surely the right of Dietrich and Felton, whose qualification to be directors was denied, and the right of the Minnesota Company, as officers and directors of which and on whose shares they claimed to qualify. The question of the right of Dietrich and Felton to qualify as directors cannot be determined in their absence.

On other grounds, I am of opinion that even if the Court had all necessary power, still, in the exercise of its discretion the declarations asked ought to be refused, even if the Court reached the conclusion that Wall's rulings were incorrect.

It is not, I think, open to question upon the evidence that in anticipation of this shareholders' meeting an understanding had been reached between Minnesota Canning Company and Fremont Canning Company, that they would act together and elect a Board of Directors, the majority of whom would be their own nominees. They now profess that they had become dissatisfied with Wall's management of the Company's business. As president he had, under clause 18 of the Company's general by-laws, the general charge and control of the business and affairs of the Company, and of the work and management of

the property thereof, and might make and enter into all contracts necessary or proper for the transaction of the business of the Company. This was subject only to the provisions of clause 17 which provided for the appointment of a chairman of the Board to preside at all meetings of the Board, and gave him general supervision over the finances of the Company, and such powers and duties as the Board of Directors might from time to time determine. Wall had been also from the beginning the general manager of the Company at a salary, as already mentioned. That it was intended to remove him from his position as manager is evident from the conduct of Cosgrove at a directors' meeting held on 23rd May, 1939, when he strongly criticized Wall's past management and had recorded in the minutes his opposition to the payment of any salary to Wall as general manager from the commencement of the fiscal year, April 1st, 1939. It was to further that design that the effort was made to make Cosgrove chairman of the shareholders' meeting, and that Gerber, in his nomination of directors, substituted two officers of the Minnesota Company for two of Wall's nominees. It is fair also to say that it is in furtherance of the same design that this action is brought.

Now it is obvious that if and so long as the Minnesota Company is bound to vote all its votable shares in favour of three of Wall's nominees for the office of director, and to observe in other respects the terms of its agreement with Wall, it is of no practical concern to anyone to determine whether or not Dietrich and Felton are qualified for the office of director under the Company's by-laws. They, or some other two nominated by Gerber, will not be elected unless the Minnesota Company votes for all of them, and that it cannot do against Wall's opposition, if the agreement holds, and if it means what respondent says it means. Yet, nothing is submitted to the Court for its decision on this, the matter of real substance; and although the Minnesota Company is principally concerned and is the largest contributor to the expense of the litigation, it is not made a party, and respondents therefore cannot raise this issue.

The Court has no doubt a wide power under sec. 15(b) of The Judicature Act to grant a declaratory judgment, but it has also been said that the jurisdiction is to be exercised with caution: *Russian Commercial and Industrial Bank v. British Bank for Foreign Trade*, [1921] 2 A.C. 438; *In re Lockyer*,

[1934] O.R. 22. It is plain, as I have said, that the real end and purpose of the appellants and of the Minnesota Company, by whom and at whose instance respectively this action is brought, is to elect a Board of Directors that will be constituted otherwise than as provided by the agreement between Wall and the Minnesota Company, according to respondent's contention as to the meaning of that agreement. The Court having a discretion, I do not think it should assist appellants in their design to control the Board of Directors by making declarations in their favour upon matters of minor importance—and it may be, of no practical importance—while appellants withhold from determination in this action the question of substance upon which any importance the other matters may have, depends. The Court cannot, in this action, determine as between the parties the real meaning of the agreement. It is contended for appellants that the agreement only binds the Minnesota Company to vote its Class "B" shares for Wall's nominees. Respondent contends that each party to the agreement is bound to vote whatever shares it can vote for three nominees of the other. Appellants are not bringing this action entirely for their own benefit. They are obviously put forward as plaintiffs by an understanding with the Minnesota Company. In the circumstances, quite apart from any other objection, I do not think the Court should exercise its discretion in favour of appellants and make the declarations asked.

I agree with the judgment of Masten J.A., which I have had the privilege of reading. Appellants appear to assume that there is some sort of natural right in the shareholders to elect their chairman. It should, I think, always be borne in mind that in the case of a company incorporated as this Company was, under the Companies' Act of Canada, what are to be looked at to see how it is governed are the Act, the letters patent incorporating the Company and its by-laws. There are many things that the shareholders cannot control by a majority vote at a shareholders' meeting. Subject to what the by-laws may provide, the appointment of president is one of them.

It may well be that if the president, or anyone else who may be chairman, should so conduct himself as chairman as to prevent the shareholders transacting the proper business of the meeting in a lawful manner, as, for example, by ordering an adjournment against the wishes of the meeting, the majority of

shareholders present may oust him and appoint another chairman in his place. Nothing of that kind is, however, in question here, and I make this observation merely to prevent any statement as to the right to preside appearing to be too absolute.

In the second action I agree with the reasons for judgment of Masten J.A., and have nothing to add.

The appeal in both actions should be dismissed with costs.

MASTEN J.A.:—The two actions above named were tried together before Rose C.J.H.C., and the appeals to this Court were argued together. Rose C.J.H.C. in an elaborate judgment dated the 25th September, 1940, dismissed the actions and the appeals are from that decision.

The general history of the circumstances to be considered has been so fully and so accurately stated by others that any repetition by me is superfluous. I agree in the conclusion of the trial Judge that these actions should be dismissed, and I also concur in the view of my Lord the Chief Justice that in the exercise of our discretion we should refuse in all the circumstances to make the declarations sought by the plaintiffs, and I agree with his reasons. My opinion in that regard is fortified by my concurrence in the argument of the respondents that no such declarations can be made in these actions as constituted, that is, in the absence as parties of all the individual holders of Class "B" shares, because the making of the declarations sought would affect the position and rights of every holder of Class "B" shares as between him and the holders of preference shares.

It might be sufficient to stop there, but out of respect to the views expressed by the trial judge, and having regard to the elaborate arguments which have been advanced to us on the various questions submitted on the record, and to the expressed desire of the parties, it seems to be desirable, and is perhaps my duty, to state my view on the several issues submitted to us.

I am of opinion that having regard to the preliminary agreement between the Minnesota Valley Canning Company and Wall dated April 1st, 1931 (Exhibit 4), and to the charter and by-laws of the company, John Wall was entitled as president to preside at the meeting of shareholders held on the 19th April, 1939.

The preliminary agreement dated the 1st of April, 1931, (Exhibit 4) provides by Clause 9 as follows:

"It is further understood and agreed between the parties that Wall shall have a right at all times to nominate three (3) of said directors, of whom one shall be president of the Company and the Corporation shall have the right to nominate the other three, of whom one shall be chairman of the Board of Directors, and that each will cause his stock to be voted to elect the nominees of the other. Each agrees further with the other that he will not for a period of twenty (20) years vote his stock in such manner as to change the provisions and agreements outlined in this paragraph."

The provision just quoted appears to me to express clearly the fundamental basis upon which the corporation and undertaking of Fine Foods Limited was organized.

Though these actions are brought in the name of the Fremont Canning Company and Johnson, it appears from the evidence that they are in truth brought also on behalf of Minnesota Valley Canning Company and are supported by it.

The charter of the company provided among others as follows:

"Clause 3. The holders of the said Preference shares shall not have any right of voting at any meeting of the shareholders of the company, nor shall such Preference shares qualify any person to be a director of the Company; provided, however, that if the company shall default in the payment of dividends for two (2) successive years, the holders of such preference shares shall thereupon acquire the right of voting at all meetings of shareholders of the company."

I refer also to certain provisions in Clause 4 of the charter:

"The Class 'A' no par value shares shall have no voting rights, but shall be preferred as to dividends over the Class 'B' no par value shares to the extent of yearly dividends of two (\$2.00) dollars per share before any dividends are paid on the Class 'B' no par value shares. . . .

"The Class 'B' no par value shares shall enjoy, subject to the provisions as to voting rights respecting Preference shares, the sole voting rights with respect to all matters pertaining to the company and the management thereof, including election of directors."

In the course of the organization of the company by-laws were duly passed by the directors and confirmed by the shareholders and I refer to certain of them bearing upon the questions at issue as follows:

"By-law 6. The affairs of the Company shall be managed by a Board of Six (6) Directors. No Shareholder shall be qualified to act as a Director unless he is a holder of one (1) share of the Class 'B' no par value stock of the Company."

"By-law 9. Four (4) Directors shall form a quorum for the transaction of business at any Meeting of the Company. No By-law, Resolution or Act of the Directors shall be effective unless at least Four (4) Directors vote in favour thereof. The presiding officer shall not have a casting vote in addition to his ordinary vote."

"By-law 15. At the First Meeting of the Board of Directors, after the Annual Meeting, the Directors *shall* elect from amongst themselves a Chairman of the Board, and a President, and may elect one or more Vice-Presidents who shall hold office until their successors are elected."

"By-law 17. The Board of Directors shall appoint from their number a Chairman of the Board, who shall preside at all meetings of the Board. The Chairman of the Board shall exercise general supervision over the finances of the Company and shall possess and may exercise such powers and shall fulfil such duties as the Board of Directors may from time to time by resolution determine."

"By-law 18. Subject to the provisions of 17, above, the President shall have the general charge and control of the business and affairs of the Company, and of the work and management of the property thereof, and may make and enter into all contracts necessary or proper for the transaction of the business of the Company."

At the time of the meeting on the 19th April, 1939, Cosgrove was the duly appointed Chairman of the Board of Directors with the specific duties and powers conferred on that office by By-law No. 17, and Wall was the duly appointed President of the company with the general powers conferred on him by By-law No. 18, namely, to have general charge and control of the business and affairs of the company. It is inherent in the office of president that he shall preside.

In Murray's English Dictionary (1909) "president" is defined as, "The appointed or elected head of a temporary or permanent body of persons who presides over their meetings and proceedings."

The definition in Webster's Revised Unabridged Dictionary (1918) is to a similar effect.

From this definition I reach the conclusion that, save in so far as the duty and power of a president was subject to some express limitation, in the charter or in the by-laws, it was the duty and right of Wall, as President, to preside at all meetings. Now there are only two classes of meetings, namely, meetings of the Board of Directors and meetings of the shareholders. Cosgrove, as Chairman of the Board of Directors, had the exclusive right of presiding at their meetings, so that the only place where Wall could perform his duty as President was by exercising his function of presiding at the meetings of shareholders. This conclusion is entirely consistent with the provisions of By-law 18 by which he is given general charge and control of the business and affairs of the company, which phrase, in my opinion, includes the business of the annual meeting of shareholders.

If I were at liberty to do so I would also rely on the mercantile and corporation practice in Canada, whereby in the absence of specific provision it has become the custom for the president as of right to preside at meetings of shareholders, but without evidence I doubt if I am warranted in doing so.

With respect to the ruling by Wall as President when he declined to receive and put before the meeting the nomination as candidates for directorship of W. F. Dietrich and E. L. E. Felton, I am of opinion that his ruling was right, and that in the face of By-law 6 providing that no shareholder shall be qualified to act as a director unless he is the holder of one share of Class "B" no par value stock of the company, the President had no option and it was his duty to refuse to receive or recognize the nomination of the two gentlemen named above.

The position seems to me to be identical with that which would arise if a person, who held no shares in a Dominion company, either personally or in any other capacity, were to be nominated for election as a director. In such a case it would, in my opinion, be the duty of the chairman of the shareholders' meeting to refuse to receive such nomination, because sec. 86(1)

of The Companies Act prescribes that only a shareholder can be elected, and in exactly the same way when the by-laws prescribe that no shareholder can be elected a director unless he is the holder of a Class "B" share and persons are named as nominees for election who do not hold a Class "B" share, I think it was the right and duty of the President as Chairman to decline to receive such nomination.

I proceed to consider the second action in which Johnson, claiming to sue on behalf of himself and all other shareholders, except Wall, seeks a declaration that Wall was not entitled to any salary after the expiry of his original agreement, and for an account and repayment of salary theretofore received after the expiry of the agreement, together with an injunction against any further payments. In regard to this claim the learned trial Judge in his reasons for judgment says:

"even if it can be taken to be proved, although the proof is of the slimmest character, that before the issue of the writ on May 16, 1939, Wall had received any salary not provided for by the last operating budget, I think the action for the recovery of the small sum so received must fail as being an action which Johnson has no right to maintain."

And after discussing the facts at some length he concludes as follows:

"So that even if it can be taken to be established that on May 1st money that had not been provided for in the budget was paid, there has been no demand upon the company to sue for the recovery of that money. I think, therefore, that even if some money has been paid for which, in an action properly constituted, judgment could be recovered, no demand upon the company to sue for the recovery of that money has been proved, and that the action cannot be maintained by Johnson."

I agree with the view so expressed, but I go further. By the agreement dated the 13th April, 1931 (Exhibit 7) made between Fine Foods Limited and John Wall, it was provided:

"1. The said Wall shall be the General Manager of the Company and as such General Manager shall perform the duties and exercise the powers which from time to time may be assigned to or vested in him by the by-laws of the Company.

"2. The said Wall shall hold the said office for the term of Five (5) years from the 8th day of April, A.D. 1931.

"3. The said Wall shall, during the said term, devote the whole of his time, attention and abilities to the business of the Company, and shall obey the orders from time to time of the Board of Directors of the Company, and in all respects conform to and comply with the directions and regulations given and made by them, and shall well and faithfully serve the company and use his utmost endeavours to promote the interests thereof.

"4. There shall be paid to the said Wall, as such General Manager, a salary of Ten thousand dollars (\$10,000.00) per annum for the first year of his employment; Twelve thousand five hundred dollars (\$12,500.00) for the second year; Fifteen thousand dollars (\$15,000.00) for the third year, and such salary for the fourth and fifth years as the Board of Directors shall determine, provided, however, that it shall not, in any event, for the said fourth and fifth years, be less than Fifteen thousand dollars (\$15,000.00) per annum."

The services so stipulated for are distinct and separate from his duties as Director and as President. The remuneration which he received was definitely and distinctly for his services as General Manager, and no provision was made for his remuneration as a Director or as President. The presumption is therefore that for his services as Director and President no provision existed and those services were to be rendered without remuneration.

After the expiry of the term of five years provided in the agreement his services as General Manager continued as before, and it is not in controversy that he was properly paid at the rate of \$15,000 per annum down to the 8th April, 1939, and possibly up to the first day of May, 1939. The writ in this action was issued and served on the 16th day of May, 1939.

I have not found any reported decisions where the question now under consideration has arisen *in an action by or against a Dominion company*. In all the reported cases provincial companies only were concerned, and it is important to observe that the Dominion Companies Act contains no provision corresponding to sec. 92 of the Ontario Act. That Act requires for the payment of the president or any director a by-law passed at a general meeting, or if passed by the directors, confirmed at a general meeting.

I think that the Dominion Companies Act coupled with the provisions of the charter and by-laws of the Fine Foods Company and the acts of the parties done thereunder, establish that at the date of the issue of the writ in the second action, Wall was rightfully exercising the function of General Manager of Fine Foods Limited and rightfully entitled to a salary at the rate of \$15,000 per annum.

The Dominion Act (1934) Canada, ch. 27, sec. 92, provides that the directors of the company may administer the affairs of the company in all things, and make or cause to be made for the company, any description of contract which the company may by law enter into; and from time to time may pass by-laws, not contrary to law or to the letters patent or supplementary letters patent, or to this part, to regulate (d) the appointment, functions, duties and removal of all agents, officers and servants of the company. Pursuant to the power so conferred the Fine Foods Co., among its by-laws enacted as follows:

"10. The Board shall have full authority to fix the salary and remuneration of any and all officers of the Company."

Pursuant to that by-law the directors of the Company at a meeting held on the 13th April, 1931, resolved that the hereinbefore recited agreement then read over to that meeting, dated 13th April, 1931, between John Wall and the Company, whereby John Wall was appointed general manager of the Company, should be and the same was thereby approved. That action of the directors was subsequently confirmed at a shareholders' meeting.

After the expiry of the original agreement in 1936, Wall continued to perform the same services as before, and the payment to him of his salary of \$15,000 per annum was approved by the directors in the annual budget of appropriations, thus placing him in the position of an employee on a yearly hiring, and no further or other action was requisite to continue him in his office of general manager on the same terms as before.

The question now under discussion arose very pointedly in the case of *Crawford v. Fullerton and the Bathurst Land Co. et al.* (1919), 37 O.L.R. 611, 42 O.L.R. 256, 59 S.C.R. 314. The defendant company was an Ontario company, subject to the provisions of sec. 92. One of the defendants, Doran, was a director of the Bathurst Land Co., and was also a land agent. He sold lands of the company and was paid some \$8,000 odd commission.

In that action claim was made for repayment by Doran to the company of the \$8,000 so received by him. There was no by-law such as is required by sec. 92 of the Ontario Act, and at the trial I held on that ground that the payment in question was *ultra vires* and that Doran was liable to repay to the company the sum he had received. That judgment was confirmed unanimously by the Ontario Court of Appeal. In the Supreme Court of Canada the finding was reversed on the ground that Doran did not receive the money in question in his capacity of director, and, secondly, that sec. 92 of the Ontario Companies Act did not apply, and that there was nothing to prevent the company from paying the money, or to prevent Doran from receiving it. The law bearing on the question was, by the majority of the Court, laid down at pp. 346 and 347 as follows:

“The commission was not paid to Doran as a director of the company, but as an agent employed by it to sell its property. I think such a payment does not fall within section 92 of the Ontario ‘Companies Act’. I agree with the view expressed by Middleton J. in *Re Matthew Guy Carriage and Automobile Co.*, 26 O.L.R. 377, at page 379, that this section does not extend to a payment to a director at the ordinary market price for a service rendered by him in his capacity of a mere employee of the company. After reviewing the authorities in *Canada Bonded Attorney and Legal Directory Co. v. Leonard-Parmiter Co.*, 42 O.L.R. 141, Mr. Justice Riddell, dealing with section 92, says, at page 144:

“There is no reason, however, why one who happens to be a director should not serve the company in another capacity, as servant, clerk, bookkeeper, mechanic, etc., and receive reasonable remuneration therefor. It is, of course, the duty of every director, a duty which he owes to his company and to the other shareholders, to see to it that he does not receive too great a remuneration for such service as he does render.

“If the services are such that only a director can perform them, *e.g.*, attending board meetings or acting in other regards as a director, he can recover compensation, payment for such services, only by complying with the statute; but, if he is employed in a subordinate capacity and at a reasonable figure, there is no necessity for a by-law confirmed at a general meeting.’

“Ferguson J.A. concurred in this judgment; Rose J. while differing on some of the facts, concurred in Mr. Justice Riddell’s

statement of the law; and Lennox J. concurred with Rose J. I think a by-law was not necessary to authorize the defendant Doran to act as agent of the company for the sale of its lands. Nor was a by-law confirmed by a general meeting required to authorize his being paid for services rendered in that subordinate capacity. They were not services rendered in the government of the company. *Mackenzie v. Maple Mountain Co.* at page 621, per Meredith J.A., 20 O.L.R. 615."

The law so laid down was affirmed and applied in *Hood v. Caldwell* (1921), 50 O.L.R. 387 and [1923] S.C.R. 488. The action was brought in their own names by certain preference shareholders of Wentworth Orchard Company Limited, an Ontario Company. Two distinct claims were made in the action as is pointed out by Anglin J., at p. 493. The second of these claims was "for repayment by the defendant Caldwell to the Wentworth Orchard Company of \$18,700 paid to him as compensation for services as its manager" during the years 1915 to 1919 inclusive.

The defendant Caldwell, against whom this claim was made, was throughout a director of Wentworth Orchard Company Limited.

The case was originally tried by Sutherland J., who dismissed the plaintiff's claim, and it was then appealed to the Court of Appeal for Ontario. In 50 O.L.R. at pp. 400 and 401, Meredith C.J.O., says:

"According to the minutes at a meeting of the Directors held on the 4th of May, 1915, a resolution was passed giving to Caldwell complete charge of the business his remuneration to be 5 per cent. of the gross sales for the year.

"If the payment of this remuneration was a payment to Caldwell *qua* director or president, but was for services rendered apart from those which it was his duty as director or president to perform, the cases of *Canada Bonded Attorney and Legal Directory Limited v. Leonard-Parmiter Limited*, 42 O.L.R. 141, 42 D.L.R. 342, and *Fullerton v. Crawford*, 59 Can. S.C.R. 314, 50 D.L.R. 457, shew that sanction by the shareholders of the payment is not necessary.

"I do not think that the application of this doctrine is limited to cases in which the employment is of minor character, and I see no reason why it should not be applied to an employment such as that which was entrusted to Caldwell, namely, that of

business manager. His duty as director or president did not extend to the performance of such duties. The duties of those offices would not occupy much of his time, but as business manager his duties would require him to give practically all his time to the performance of them."

And in the Supreme Court of Canada, Anglin J., at pp. 493 *et seq.*, after pointing out that the trial Judge properly found that the resolution provided for Caldwell's remuneration as manager was passed by the directors and querying whether sec. 92 of the Ontario Act applies to services usually performed by a salaried employee but not rendered *qua* president or director, goes on to say:

"I had occasion to discuss this aspect of the matter in *Fulberton v. Crawford* (*supra*). I also agree that a repetition of the directors' resolution in each subsequent year was not necessary."

The claim having been disallowed by the trial Judge, his decision in this respect was confirmed by the Court of Appeal and by the Supreme Court of Canada.

The law so stated by the Supreme Court of Canada remains, in my opinion, the law to-day. The only other pronouncement of that Court on a cognate question is *Cape Breton Cold Storage Co. v. Rowlings*, [1929] S.C.R. 505. In that case the plaintiff, who was a director and vice-president of the defendant company, acted as its solicitor (although not formally appointed as such) in a great number of matters, and was consulted and his advice sought by his co-directors and the officers of the company. He sued for an account for legal services rendered, and his action was dismissed in the Supreme Court of Canada. That case is distinguishable from the present in that there was no retainer or other contract of employment, and the services were such as a director who held such substantial interests in the company might well render without remuneration. The company in that case appears to have been incorporated under a Special Provincial Act, the claimant was compelled to rely on the Trustee Act of Nova Scotia, and the case appears to have been fought out on the question of whether the provisions of the provincial Trustee Act warranted him in recovering. The case is distinguished by Rose C.J.H.C. in *Premier Trust Co. v. McAllister*, [1933] O.R. 195, at p. 205, where he says,

"That was a case of a company whose Articles of Association contained no provision allowing a director to contract with the company, so that unless the claim could be supported by resort to the Trustee Act of Nova Scotia, which was held not to be applicable, it could not be supported at all."

The decision does not in my opinion vary or qualify in any way the law as declared in *Crawford v. Bathurst* (*supra*).

If, as I think, the law has been authoritatively laid down by the Supreme Court of Canada it becomes unnecessary and therefore undesirable to discuss the decisions of Provincial Courts in determining questions arising out of Provincial Company Acts. I should add, however, that after careful consideration of the cases cited to us for the appellant, I conclude that they do not form any guide for determining the question now under consideration.

As the Dominion Act contains no limitation such as is prescribed by sec. 92 of the Ontario Act, and as By-law 10 of the Fine Foods Company and the resolutions of the Board of Directors during the years 1936, 1937 and 1938 evidenced a full compliance with the requirements of the Dominion Companies Act, the only remaining ground of attack is that Wall's interests as general manager might conflict with his duty as a director, but that contention seems to me to be absurd, for his interests as director and his interests as general manager and as a large shareholder are identical, namely, to make a success of the operations of Fine Foods Limited.

My conclusion, as a result of the above, is that as Wall was originally employed as general manager (before his appointment as a director and president) at a salary of \$15,000 per annum, and as his employment was continued on the same basis down to April, 1939, as a yearly hiring, this Court is not precluded from finding that from April, 1939, there is an implied agreement that Wall's employment continued after April 8th, 1939, for so long as the parties mutually agreed, and could be terminated only by reasonable notice from the Board of Directors: *Harnwell v. Parry Sound Lumber Co.* (1897), 24 Ont. App. Rep. 110; *Messer v. Barrett* (1926), 59 O.L.R. 566.

No notice terminating his employment has been given to Wall by the Fine Foods Co. and his employment, therefore, continues until the expiry of such notice. For this reason, supplementing the ground relied upon by the trial Judge, I am of opinion that

the claim of Johnson in the second action for recovery of salary from John Wall, and for an injunction, fails.

I would dismiss the appeals with costs.

GILLANDERS J.A. agreed with ROBERTSON C.J.O. and MASTEN J.A.

Appeals dismissed with costs.

[COURT OF APPEAL.]

Re Sullivan.

Defence of Canada Regulations—The War Measures Act, R.S.C. 1927, ch. 206—Habeas Corpus—Internment order made by Minister of Justice—Communist Party—Regulations 21 and 22.

Regulation 21 of the Defence of Canada Regulations made under The War Measures Act, R.S.C. 1927, ch. 206, provides that "the Minister of Justice, if satisfied, that with a view to preventing any particular person from acting in any manner prejudicial to the public safety or the safety of the State, it is necessary to do so, may, notwithstanding anything in these Regulations, make an order (c) directing that he be detained in such place, and under such conditions, as the Minister of Justice may from time to time determine; and any person shall, while detained by virtue of an order made under this paragraph, be deemed to be in legal custody."

Held, (1) In the performance of the duty imposed upon the Minister of Justice by Regulation 21, the investigation need not be a personal investigation by him, but may be made by those delegated on his behalf. It may well be that the Minister may be satisfied, as required by the Regulation, upon the bare recommendation of a Commissioner or some other person delegated to investigate and recommend. Upon a review of the information so garnered or even upon a recommendation of an assistant delegated to investigate and recommend, the Minister may well be satisfied within the terms of the Regulation, and, if he is so satisfied, that is a matter which is discretionary with the Minister in his administrative capacity and is not subject to review by the Courts.

(2) A person interned under Regulation 21 shall, according to the terms of Regulation 21, be deemed to be in legal custody. Regulation 21 having been made by virtue of sec. 3 of The War Measures Act, it then, by virtue of sec. 3(2) of the Act has the full force of law and must be enforced by the Courts.

A motion by John Alan Patrick Sullivan for a writ of habeas corpus.

The motion was heard by HOPE J. in Chambers at Toronto.
J. L. Cohen, K.C., for J. A. P. Sullivan, applicant.

R. L. Kellock, K.C., and J. D. Arnup, for Colonel Hubert Stethem, Assistant Director of Internment Operations.

January 9th, 1941. HOPE J.:—The applicant moved before me in Chambers for a writ of habeas corpus, *ad subjiciendum*

discharging him from the detention in which he is held under the provision of regulation No. 21 of The Defence of Canada Regulations. Upon the hearing and by the consent of both counsel, the motion was turned into one for judgment as upon the return of the writ.

By order of the Minister of Justice issued under Regulation 21 of The Defence of Canada Regulations established by Order-in-Council on the 3rd September, 1939, and subsequently amended and consolidated by Order-in-Council dated the 16th day of September, 1940, and passed under and by virtue of the power conferred by The War Measures Act, ch. 206 of the Revised Statutes of Canada, 1927, the applicant Sullivan was detained on June 18th, 1940, and continues to be so detained. Following his detention, and in accordance with Regulation 22, an objection was filed by Sullivan. Thereupon on the instructions of the Committee appointed under the said section, the applicant was informed, in compliance with Regulation 22, (3A), (d), of the grounds on which the order had been made against him, and was furnished with such particulars as were, in the opinion of the Committee, sufficient to enable him to present his case, which notification was by letter reading as follows:

"Your detention has been deemed necessary in the interests of the State because representations have been made that you are a member of the Communist Party of Canada, a subversive organization which is opposed to the interests of Canada. In view of this, it would appear that you are disloyal to Canada."

Counsel for the applicant strongly argued that this information failed completely to give such particulars as would be sufficient to enable the applicant to present his case, and that such particulars and grounds as stated in the said communication here quoted were not given by the Committee with reference to this particular detention, but were mechanically issued by a subordinate as a result of general instructions issued by the two Committees as to the particulars to be furnished to an objector of this class. It would appear from such material as the Minister of Justice has seen fit to disclose to the Court herein, that the decision was ordered on the grounds that the applicant was or continued to be a member of the Communist Party of Canada. This party had been outlawed by Order-in-Council. It would further appear that the Committee duly appointed under Regulation 22 as advisory to the Minister of Justice, considered and

gave instructions to the Solicitor in the Department that in all cases of detention such as that of the applicant, the particulars to be furnished were as contained in the foregoing notice. I am of the opinion that the Committee has properly discharged its duty herein without delegation of its powers to any subordinate other than for the mechanics in connection with the issuing of the said notice to the objector. Furthermore, it should be noted that the particulars required to be furnished are such as *in the opinion of the Committee* are sufficient to enable the objector to present his case. The Committee has given such particulars as it deemed sufficient—even although the objector may be far from satisfied. This being a discretionary matter for the Committee, it is not subject to the review and direction of the Court. I therefore do not propose to deal further with counsel's objection as to the sufficiency of the particulars furnished to the applicant under Regulation 22. Moreover, I am of the opinion in any event that the question as to the propriety or regularity of the proceedings provided for in Regulation 22, does not go to the root or otherwise govern the issuance of the order of detention under Regulation 21 or of the continuance of the detention.

It is not obligatory on the part of the Minister of Justice to accept the advice or finding of the Committee after a hearing provided for by Regulation 22 hence it would appear to be unreasonable to hold that the validity of the order under Regulation 21 is contingent upon direct compliance with 22. The provisions contained in Regulation 22 govern proceedings after the order of detention, and not preceding it. On this motion I am concerned only with the validity of the order of detention itself.

The words of Regulation 21 pertinent to this application read as follows:

"21(1) The Minister of Justice, if satisfied, that with a view to preventing any particular person, from acting in any manner prejudicial to the public safety, or the safety of the State, it is necessary to do so, may . . . make an order:

"(c) Directing that he be detained in such place and under such conditions as the Minister of Justice may from time to time determine; and any person shall, while detained by virtue of an order made under this paragraph be deemed to be in legal custody."

The order herein was made by the Minister of Justice on the 17th of June by the endorsement of his approval with his signature on the following memorandum which had been prepared for the Minister of Justice by his subordinates:

“Re Defence of Canada Regulations.
Regulation 21.

“Attached hereto is memorandum dated 17th June, 1940, submitted by the Commissioner of the Royal Canadian Mounted Police, containing a list of persons whom he recommends should be detained under the provisions of Regulation 21 of The Defence of Canada Regulations.

“In view of the information disclosed in this memorandum, if you are satisfied that with a view to preventing these persons from acting in a manner prejudicial to the safety of the public or to the safety of the State, it is necessary so to do, it is recommended that you make an order directing that they be detained under the provisions of the above mentioned regulations.”

To this memorandum is attached an extract from a list submitted by the Commissioner of the Royal Canadian Mounted Police, and referred to in the order of the Minister dated 17th June, 1940.

“5. John A. (Pat) Sullivan.”

It is quite obvious that while the material produced refers only to the extracted name of the applicant herein, which appeared as No. 5 on a list submitted to the Minister, yet it is equally obvious that there was also a further memorandum which disclosed certain information.

Again, it seems obvious that this information so disclosed would be more than the bare listing of the applicant's name, together with others, as the memorandum to the Minister states: “Attached hereto is a memorandum (i.e. a second one) . . . In view of the information disclosed in this memorandum, if you are satisfied . . . ”

Counsel for the respondent consistently throughout took the position that the contents of such second memorandum so attached should not be disclosed because of the necessity of secrecy in matters of State. I am satisfied that such information need not be disclosed in the circumstances. However, the

discussion and admission by counsel of its existence supports the assumption from the documents here produced, that the Minister had before him a report as a result of certain investigations made by those under his authority. It is well-established that where a duty rests upon the Minister of Justice, as in this case, the investigation need not be a personal investigation by him, but may be made by those delegated on his behalf. It may well be that the Minister may be satisfied as required by the regulation upon the bare recommendation of the Commissioner or some other person delegated to investigate and recommend. Upon a review of the information so garnered or even upon a recommendation of an assistant delegated to investigate and recommend, the Minister may well be satisfied within the terms of the regulation. If so satisfied, then it is a matter which is discretionary with the Minister in his administrative capacity, and is not subject to the review of the Courts.

I am of the opinion that no quarrel can be had with the procedure and mechanics attendant upon the issue of this order, and that the same has been validly issued. That being so, it is of particular importance to note the effect of the last clause of the Regulation, viz.:

"Any person shall, while detained by virtue of an order under this paragraph, be deemed to be in legal custody." This being a Regulation made under and by virtue of sec. 3 of The War Measures Act as to arrest and detention, it then, by virtue of sec. 3, subsec. 2, shall have the full force of law and shall be enforced by the Courts.

In matters involving the liberty of the subject the action of the Crown or its Ministers or officials is subject to the supervision and control of the Judges on habeas corpus. The Judges owe a duty to safeguard the liberty of the subject not only to the subject but to the Crown.

The writ of habeas corpus *ad subjiciendum* is a prerogative process available for securing the liberty of the subject by affording an effective means of immediate release from unlawful or unjustifiable detention. The Court may inquire into the regularity of the commitment.

Being thus satisfied that the order of the Minister is in due form, the applicant must be deemed to be in legal custody and the writ of habeas corpus must be discharged and the applicant remanded in custody.

In support of my conclusions herein, I refer to the words in the judgment in *Ronnfeldt v. Phillips* (1918), 35 T.L.R. 47: "A war could not be carried on according to the principles of Magna Carta," and this strikes one as being of particular application in the circumstances of the present war, where, it has been made abundantly clear that enemy operations are not confined to theatres of war, but that in an all-out war such as the present, the success of the totalitarian powers has been made possible in no small measure by the subversive activities of agents within the gate. In such circumstances, and as was stated in *Rex v. Halliday, Ex parte Zadiz*, [1917] A.C. 260:

"Freedom of executive action in the interests of public safety requires that sympathetic construction be given to statutory authorization of delegated legislation," or, again, as expressed by McLean J., in the Exchequer Court of Canada in *Arpad Spitz v. Secretary of State for Canada*, [1939] Ex. C.R. 162, at p. 166:

"When you come to interpret any war measure, the objects of the same must be held strictly in mind, and such measures must be given that construction which will best secure the end their authors had in mind. One must consider not only the wording of the War Measures, but also their purpose, the motives which led to their enactment and the conditions prevailing at the time. In time of war, the substance of things must prevail over form and usually all technicalities are swept aside."

The judgment of the Court of Appeal in Manitoba in *Yasny v. Lapointe*, [1940] 2 W.W.R. 373, is of particular application to the motion at bar, and I adopt the principle of the application of The Defence of Canada Regulations therein set out by the majority of the Court.

Mr. Kellock in his argument advanced the further grounds for refusal of the writ, viz., that persons detained under the provision of Regulation 21, are classed as prisoners of war, class 2, and that Regulation 50 of the Regulations governing the maintenance of discipline among and treatment of prisoners of war promulgated by virtue of the Order-in-Council, P.C. 4121 dated December 13, 1939, becomes operative. Clause 2 of Part I "General" of these last named Regulations reads:

"In these Regulations, enemy aliens or *other persons interned under the provisions of the Defence of Canada Regulations*,

shall be referred to as 'prisoners of war, class 2.' " It should be noted that this uses the clause "other persons interned." Under the Defence of Canada Regulations, the words "interned" and "internment" are to be found only in those Regulations dealing with enemy aliens. Persons dealt with under Regulation 21 are, to use the words of the Regulation, "detained" not "interned" and therefore it might be considered that the Regulations governing prisoners of war referred to by Mr. Kellock are not to be applied to persons "detained" but only to those "interned", but upon further reference to Regulation for Defence of Canada No. 23(4) the following provision is made:

"The term 'prisoner of war' used in this Regulation shall include any person detained or interned under these Regulations."

Moreover, taking the normal dictionary meaning "to detain" is described "to keep in confinement; to keep a prisoner" and "to intern" is defined "to confine within the limits of a place," I am of the opinion that applying the principles of interpretation set out in the foregoing references, and in particular the words of the President of the Exchequer Court in *Arpad Spitz v. The Secretary of State for Canada*, (*supra*), I must conclude that the Regulations governing the maintenance of discipline among and the treatment of prisoners of war are applicable to all those detained under Regulation 21.

If persons detained under Regulation 21 are held to be prisoners of war, class 2, then Regulation 50 governing prisoners of war becomes operative. It reads as follows:

"No prisoner of war interned in a temporary or permanent internment camp is to be released without authority of the director of internment operations." This Regulation having the force of law under the provisions of The War Measures Act, precludes, in my opinion, the granting of a release under the writ of habeas corpus herein, without the consent of the Director of Internment Operations. This conclusion would appear to be borne out by the decision of Meredith, C.J.C.P., in *Re Beranek*, 33 O.L.R. 139, at p. 140, which, in dealing with the Regulations then existing under The War Measures Act and particularly with the 11th section thereof, whereby it was enacted that no person under arrest or detention was to be released or otherwise discharged or tried without the consent of the Minister of Justice, held that habeas corpus was not applicable without the consent of the Minister of Justice.

After a perusal of the various judgments delivered by the members of the Supreme Court of Canada, *In re Gray* (1918), 57 S.C.R. 150, it would appear to be without question that the Regulations for the Defence of Canada and also the Regulations governing the maintenance of discipline among and treatment of prisoners of war being based upon the provisions of The War Measures Act, are *intra vires*.

In concluding it might be said that my consideration of this application is not concerned in any way with the question of the policy governing these detentions, but solely with the question of whether or not the Regulations are *intra vires* and in turn what, in law, should be the construction to be placed upon such Regulations. Policy is a question for Parliament. At this grave moment in our struggle, not only for the democratic way of life but for our very existence, it may appear at times that some measures taken by the Government come near to suspending the very essence of our Constitution as it has been built up over the centuries. However it may be imperative that our ancient liberties be placed in pawn for victory. By the Regulations, the Minister is still required to report to Parliament with respect to detentions. Our ancient liberties will not necessarily be swept away even though, for the moment, we are governed by Order-in-Council rather than by Statute, for although the form of the law may be altered, the spirit remains unchanged. This has been well expressed during the last Great War in the judgment of the House of Lords in *The King v. Halliday*, [1917] A.C. 260. Lord Dunedin there said:

"The danger of abuse is theoretically present; practically, as things exist, it is in my opinion absent," and again, Lord Atkinson in the same judgment also observed:

"However precious the personal liberty of the subject may be, there is something for which it may well be, to some extent, sacrificed by legal enactment, namely, national success in the war, or escape from national plunder or enslavement. It is not contended in this case that the personal liberty of the subject can be invaded arbitrarily at the mere whim of the executive. What is contended is that the executive has been empowered during the war, for paramount objects of State, to invade by legislative enactment that liberty in certain states of fact."

The application is therefore dismissed, and the applicant remanded in custody.

While ordinarily costs should be awarded as against the applicant, yet I am of the opinion that this is not a case in which there should be any order for costs.

J. A. P. Sullivan appealed to the Court of Appeal from the order of Hope J.

April 17th, 1941. The appeal was heard by MIDDLETON, MASTEN and HENDERSON JJ.A.

J. R. Cartwright, K.C., and *J. L. Cohen*, K.C., for the appellant.

R. L. Kellock, K.C., and *J. D. Arnup*, for the respondent.

The Court, without calling on counsel for the respondent, dismissed the appeal with costs.

Appeal dismissed with costs.

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